TEXAS REGISTER

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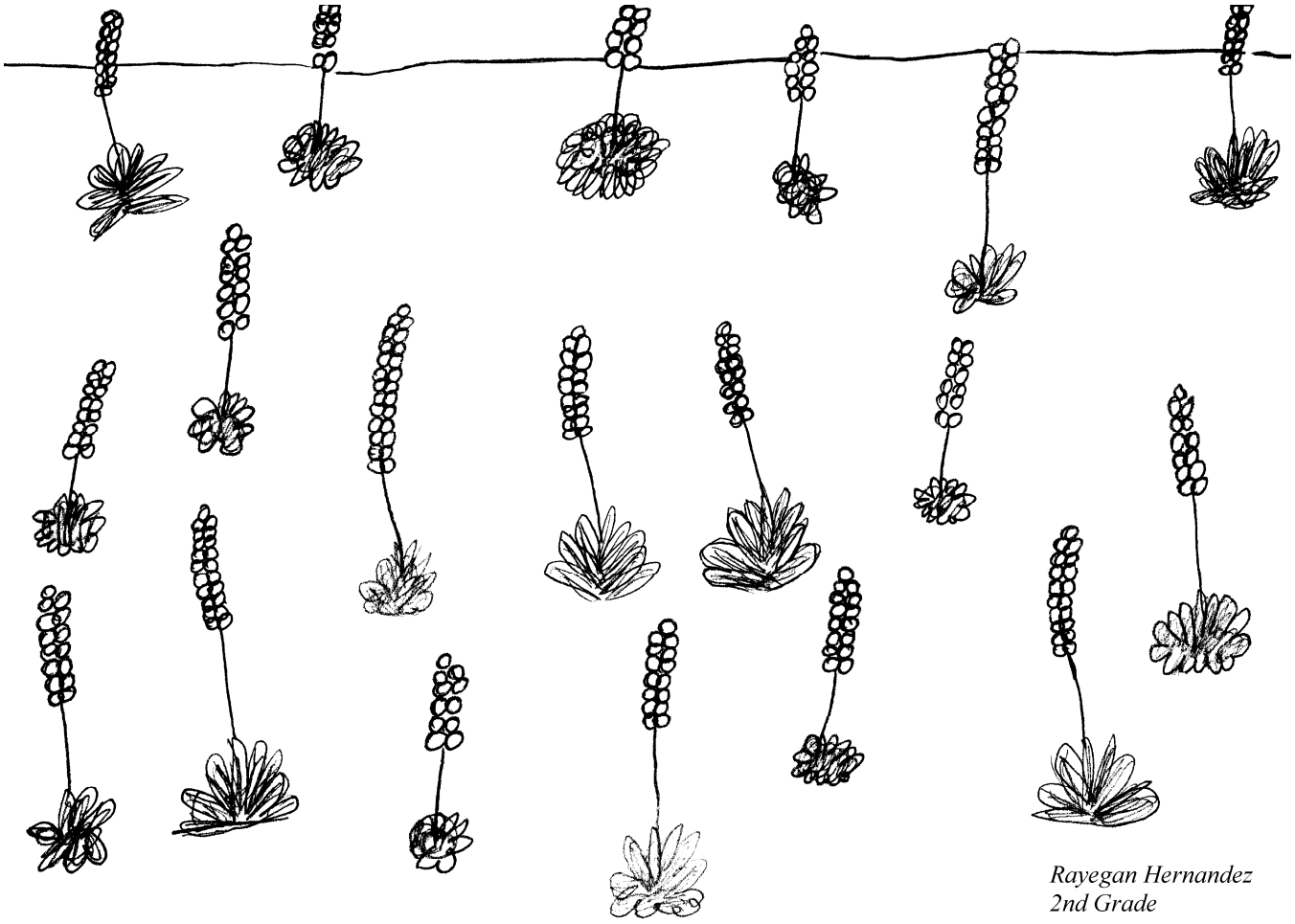

Rayegan Hernandez
2nd Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

RULE REVIEW

TABLES AND GRAPHICS

IN ADDITION

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0703-GA

Requestor:

The Honorable Jerry Madden

Chair, Committee on Corrections

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Whether an out-of-state company may be considered a "resident bidder" under particular circumstances (RQ-0703-GA)

Briefs requested by June 2, 2008

RQ-0704-GA

Requestor:

The Honorable Joe Driver

Chair, Committee on Law Enforcement

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Whether the Public Information Act, chapter 552, Government Code, prohibits the disclosure of a vehicle identification number if that number is not accompanied by or identified with any personal information about the owner of the vehicle (RQ-0704-GA)

Briefs requested by June 5, 2008

RQ-0705-GA

Requestor:

Mr. James A. Cox, Jr., Chair

Texas Lottery Commission

Post Office Box 16630

Austin, Texas 78761-6630

Re: Whether electronically-readable information from a driver's license may be used to verify the age of persons using self-service terminals and vending machines to purchase lottery tickets (Request No. 0705-GA)

Briefs requested by June 6, 2008

RQ-0706-GA

Requestor:

Mr. Brian S. Rawson, Executive Director

Texas Department of Information Resources

Post Office Box 13564

Austin, Texas 78711-3564

Re: Conflict of interest provisions applicable to members of the board of the Texas Department of Information Resources (Request No. 0706-GA)

Briefs requested by June 6, 2008

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200802391
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: May 7, 2008

♦ ♦ ♦

Opinions

Opinion No. GA-0620

Mr. Sidney "Buck" LaQuey

Grimes County Auditor

Post Office Box 510

Anderson, Texas 77830

Re: Procedures that a commissioners court must follow in the annual budget process in regard to salaries and personal expenses for each elected county and precinct officer (RQ-0642-GA)

S U M M A R Y

"Before filing the annual budget with the county clerk," the commissioners court of a county is required to provide "written notice to each elected county and precinct officer," including members of the court itself, "of the officer's salary and personal expenses to be included in the budget." TEX. LOC. GOV'T Code ANN. §152.013(c) (Vernon 2008). Recommendations of a salary grievance committee should be considered before a commissioners court adopts a final budget. If a com-

missioners court fails to give written notice of a commissioner's salary and expenses included in the budget, the commissioners court may not adopt a proposed salary reduction, and the salaries of the commissioners must remain fixed at the prior year's amount.

Opinion No. GA-0621

The Honorable Rex Emerson

Kerr County Attorney

County Courthouse, Suite BA-103

700 Main Street

Kerrville, Texas 78028

Re: Status of the Kerr County Airport Authority (RQ-0643-GA)

S U M M A R Y

The Kerr County Airport Authority ("Authority"), established in 1970, is still in legal existence, and the board of directors may be appointed. Because the City of Kerrville and County of Kerr have not sold, given, or leased their interests in the airport to the Authority, they may govern the airport via a joint board under chapter 22, Transportation Code.

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200802404
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: May 7, 2008

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 73. STATUTORY DOCUMENTS
SUBCHAPTER A. LABOR ORGANIZERS

1 TAC §73.3

The Office of the Secretary of State proposes an amendment to 1 TAC §73.3, concerning labor organizer's card. The amendment is proposed in response to a public comment which noted an inaccurate reference to the state seal under paragraph (5) of the section.

The paragraph now reads: "the signature of the secretary of state, dated and attested by his seal of office." As pointed out by the commenter during a formal review of Secretary of State rules, the "seal" is not the seal of office for the secretary of state. It is the State Seal of Texas as defined by the Texas Constitution, Article IV, Section 19.d. The amendment is proposed to correct this error.

Linda Stout, Director of the Statutory Documents Section, has determined that for each year of the first five years that the section is in effect there will be no fiscal implications to state or local governments as a result of enforcing or administering the amendment as proposed.

Ms. Stout also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing or administering the section as proposed will be to correct the reference to the state seal in the Secretary of State rule. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the proposed rule.

Comments on the proposed amendment may be submitted in writing to: Linda Stout, Office of the Secretary of State, Statutory Documents Section, 1019 Brazos Street, Room 214, Austin, Texas 78701. Comments must be received not later than 12 noon, Monday, June 16, 2008.

Statutory Authority: §2001.004(1) of the Government Code.

The rule implements §101.110 of the Labor Code.

§73.3. Organizer's Card.

Upon receipt of a complete and signed application, the secretary of state shall issue an organizer's card to the applicant. The card shall bear the following information:

(1) - (4) (No change.)

(5) the signature of the secretary of state, dated and attested by the state seal [~~his seal of office~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 1, 2008.

TRD-200802333
Lorna Wassdorf
Director of Business and Public Filings Division
Office of the Secretary of State
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 463-5705

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.114

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.114, concerning Consumer Directed Services Payment Option.

Background and Justification

The proposed amendment to §355.114 describes the reimbursement methodology for Support Consultation services. This rule does not apply to Department of Aging and Disability Services' (DADS) program rules.

The DADS implemented the Consumer Directed Services (CDS) option in September 2001, in response to Senate Bill 1586, 76th Legislature, Regular Session, 1999. The CDS option allows consumers or their legal guardians to be employers of record for the service providers. Thus, as participants in CDS, consumers have greater control and responsibility for their care and are able to self-direct their services. Consumers who participate in CDS choose a CDS Agency (CDSA) to provide financial management services such as payroll processing, assistance with developing a budget, and guidance to the consumer acting as an employer.

The CDS option is available in the following programs:

* Community Based Alternatives (CBA);

* Community Living Assistance and Support Services (CLASS);

* Deaf-Blind-Multiple Disability Waiver (DBMD);

* Primary Home Care (PHC);

* Consumer Managed Personal Assistance Services (CMPAS);

* Medically-Dependent Children's Program (MDCP);

* Home and Community Based Services (HCS); and

* Texas Home Living (TxHmL).

The DADS is adding Support Consultation services to the CDS option. Support Consultation services help a consumer meet the required employer responsibilities associated with CDS participation. Support Consultation services provide a higher level of assistance and training to the consumer than the CDSA, including skills training, assistance with completing required documents, and coaching on various employer tasks. A Support Advisor provides the Support Consultation services.

Support Consultation services became available in the HCS and TxHmL waivers effective February 1, 2008. It is scheduled to be implemented in PHC and the other waiver programs over the next year, pending CMS approval.

Section-by-Section Summary

The amendment creates a new subsection (c), which explains that the hourly payment rate for Support Consultation services is determined by modeling the estimated costs to carry out these responsibilities. The hourly payment rate for Support Consultation services is determined by modeling the cost of providing this service, as defined by the DADS, using staff costs and other statistics from the most recently audited cost reports from providers for staff whose required qualifications are similar to the qualifications required for individuals delivering Support Consultation services.

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the DADS, has determined that, for the first five-year period the proposed amendment is in effect, there is no fiscal implication for state government as a result of enforcing or administering the section. There are no fiscal implications for local governments as a result of enforcing or administering the section.

Small Business and Micro-business Impact Analysis

Mr. Taylor has also determined that there will be no adverse economic effect on small or micro-businesses as a result of enforcing or administering the proposed section. There is no anticipated economic cost to persons who are required to comply with the proposed section. There is no anticipated effect on local employment in geographic areas affected by this section.

Public Benefit and Costs

Carolyn Pratt, Director of Rate Analysis, has determined that, during the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing §355.114 is that it will allow the state to determine an appropriate rate for Support Consultation services based on the modeled cost of providing services with employees whose required qualifications are similar to those of the Support Advisor.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposal may be submitted to Sarah Hambrick in the Rate Analysis Division, Texas Health and Human Services Commission, P.O. Box 85200, Austin, Texas 78708-5200; by fax (512) 491-1998 or by e-mail at sarah.hambrick@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Statutory Authority

The amendment is proposed under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendments to the current rules affect the Human Resources Code Chapter 32, and the Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.114. Consumer Directed Services Payment Option.

(a) For all programs providing consumer directed services (CDS) except the Home and Community-based Services (HCS) program:

(1) The monthly payment to the contracted CDS agency is determined by modeling the estimated cost to carry out the responsibilities of the CDS agency.

(2) The rates for CDS that provide the funds available to the consumers participating in CDS are modeled and are based on the payment rates paid to contracted agencies for providing services to consumers who do not participate in CDS, and then removing from those rates amounts needed to fund CDS agencies responsibilities.

(3) The sum of the payments to the contracted CDS agencies for a 12-month period and the funds available to the consumers participating in CDS for the same 12-month period will not exceed, in the aggregate, the amount that would have been paid to agencies for the same 12 month period if the consumers were not participating in CDS.

(b) For the HCS program:

(1) The monthly payment to the contracted CDS agency is determined by modeling the estimated cost of carrying out the responsibilities of the CDS agency.

(2) The rates for CDS that provide the funds available to the consumer participating in CDS are modeled and are based on the direct care costs plus a portion of the operating costs included in the HCS rate.

(3) The monthly payment to the contracted CDS agency for a 12-month period and the funds available to the consumer participating in CDS for that same 12-month period will not exceed the amount that

would have been paid to an agency for the same 12 month period if the consumer was not participating in CDS.

(c) Support Consultation services. The hourly payment rate for Support Consultation services is determined by modeling the cost of providing this service, as defined by the Department of Aging and Disability Services, using staff costs and other statistics from the most recently audited cost reports from providers for staff whose required qualifications are similar to the qualifications required for individuals delivering Support Consultation services. The requirements for a Support Advisor are found at 40 TAC §41.603 (relating to Support Advisor Qualifications).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 1, 2008.

TRD-200802306
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 424-6576

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SUBCHAPTER E. COMMUNITY CARE FOR AGED AND DISABLED

1 TAC §355.503

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.503, Reimbursement Methodology for the Community-Based Alternatives Waiver Program and the Integrated Care Management-Home and Community Support Services and Assisted Living/Residential Care Programs.

Background and Justification

This rule establishes the reimbursement methodology for the Community-Based Alternatives (CBA) waiver program and the Integrated Care Management-Home and Community Support Services (ICM-HCSS) and Assisted Living/Residential Care (AL/RC) programs. The CBA waiver program and the ICM-HCSS program include in their service arrays out-of-home respite care delivered in a nursing facility. HHSC, under its authority and responsibility to administer and implement rates, is updating these rules to replace a reference in subsection (d)(2)(C) to the Texas Index for Level of Effort (TILE) case mix class with a general reference to the Nursing Facility (NF) case mix class. This will allow HHSC to continue to reimburse out-of-home respite care provided in a nursing facility.

The Texas Medicaid nursing facility program currently uses the TILE case mix system to establish nursing facility reimbursement rates. Effective September 1, 2008, HHSC will replace the TILE case mix system with the Resource Utilization Groups (RUG) case mix system for setting nursing facility reimbursement. Reimbursement rates for CBA and ICM-HCSS out-of-home respite currently are based on nursing facility TILE rates. Because of the change to the nursing facility case mix system, the CBA and ICM-HCSS out-of-home respite reimbursement methodology must be revised to remove the reference to TILE. This proposed amendment replaces the reference to TILE with a general reference to the nursing facility case mix system.

Reimbursement for out-of-home respite services may increase or decrease at the individual provider level as a result of this amendment. Increases and decreases will depend on the TILE classifications of each provider's out-of-home respite clients prior to the effective date of the amendment and the RUG classifications of those same clients after the effective date of the amendment. The change to any individual provider's overall average reimbursement will be negligible because out-of-home respite units of service make up such a small percentage of the total units of service provided under these programs. The amendment will not have a fiscal impact overall.

Section-by-Section Summary

The amendment revises subsection (d)(2)(C) to indicate that reimbursement for out-of-home respite care provided in a nursing facility will be based on the nursing facility case mix class in which the CBA or ICM-HCSS participant is classified. Effective September 1, 2008, nursing facilities will use the RUG case mix system to set nursing facility rates.

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that there will not be a fiscal impact to state government during the first five-year period the amended rule is in effect. The proposed rule will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering the section.

Small Business and Micro-business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. The implementation of the proposed rule amendment does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this amendment. The amendment will not affect local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that, for each of the first five years the amendment is in effect, the expected public benefit is that CBA and ICM-HCSS out-of-home respite rates will be based on a case mix classification system that reflects more current practice patterns which will, in turn, lead to a more equitable distribution of payments across different types of participants with differing needs.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This

proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Public Comment

Questions about the content of this proposal may be directed to Pam McDonald in the HHSC Rate Analysis Department by telephone at (512) 491-1373. Written comments on the proposal may be submitted to Ms. McDonald by facsimile at (512) 491-1998, by e-mail to pam.mcdonald@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendment affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§355.503. Reimbursement Methodology for the Community-Based Alternatives Waiver Program and the Integrated Care Management-Home and Community Support Services and Assisted Living/Residential Care Programs.

(a) General requirements. The Texas Health and Human Services Commission (HHSC) applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction).

(b) General. Texas Medicaid contracted providers will be reimbursed for waiver services provided to individuals who meet the criteria for alternatives to nursing facility care. Additionally, Texas Medicaid contracted providers will be reimbursed for a pre-enrollment assessment of potential waiver participants. The pre-enrollment assessment covers care planning for the participant and is reimbursed by a one-time administrative expense fee which is not included in the waiver services but will be paid from Medicaid administrative funds.

(c) Other sources of cost information. If HHSC has determined that there is not sufficient reliable cost report data from which to determine reimbursements and reimbursement ceilings for waiver services, reimbursements and reimbursement ceilings will be developed by using data from surveys; cost report data from other similar programs, consultation with other service providers and/or professionals experienced in delivering contracted services; and other sources.

(d) Waiver reimbursement determination. Recommended reimbursements are determined in the following manner.

(1) Unit of service reimbursement. Reimbursement for personal assistance services, nursing services provided by a registered nurse (RN), nursing services provided by a licensed vocational nurse (LVN), physical therapy, occupational therapy, speech pathology, and in-home respite care services will be determined on a fee-for-service basis in the following manner.

(A) Total allowable costs for each provider will be determined by analyzing the allowable historical costs reported on the cost report.

(B) Total allowable costs are reduced by the amount of the pre-enrollment expense fee and requisition fee revenues accrued for the reporting period.

(C) Each provider's total reported allowable costs, excluding depreciation and mortgage interest, are projected from the historical cost-reporting period to the prospective reimbursement period as described in §355.108 of this title (relating to Determination of Inflation Indices). The prospective reimbursement period is the period of time that the reimbursement is expected to be in effect.

(D) Payroll taxes and employee benefits are allocated to each salary line item on the cost report on a pro rata basis based on the portion of that salary line item to the amount of total salary expense for the appropriate group of staff. Employee benefits will be charged to a specific salary line item if the benefits are reported separately. The allocated payroll taxes are Federal Insurance Contributions Act (FICA) or Social Security, Medicare Contributions, Workers' Compensation Insurance (WCI), the Federal Unemployment Tax Act (FUTA), and the Texas Unemployment Compensation Act (TUCA).

(E) Allowable administrative and facility costs are allocated or spread to each waiver service cost component on a pro rata basis based on the portion of each waiver service's units of service to the amount of total waiver units of service.

(F) For nursing services provided by an RN, nursing services provided by an LVN, physical therapy, occupational therapy, speech pathology, and in-home respite care services, an allowable cost per unit of service is calculated for each contracted provider for each service. The allowable costs per unit of service for each contracted provider are arrayed. The units of service for each contracted provider in the array are summed until the median unit of service is reached. The corresponding expense to the median unit of service is determined and is multiplied by 1.044. The allowable costs per unit of service may be combined into an array with the allowable cost per unit of service of similar services provided by other programs in determining the weighted median cost per unit of service.

(G) For personal assistance services two cost areas are created:

(i) The attendant cost area includes salaries, wages, benefits, and mileage reimbursement calculated as specified in §355.112 of this title (relating to Attendant Compensation Rate Enhancement).

(ii) Another attendant cost area is created which includes the other personal attendant services costs not included in subparagraph (G)(i) of this paragraph as determined in subparagraphs (A) - (E) of this paragraph. An allowable cost per unit of service is determined for each contracted provider for the other attendant cost area. The allowable costs per unit of service for each contracted provider are arrayed. The units of service for each contracted provider in the array are summed until the median unit of service is reached. The corresponding expense to the median unit of service is determined and is multiplied by 1.044.

(iii) The attendant cost area and the other attendant cost area are summed to determine the personal assistance services cost per unit of service.

(2) Per day reimbursement.

(A) The reimbursement for Adult Foster Care (AFC) and out-of-home respite care will be determined as a per day reimbursement using a method based on modeled projected expenses which are developed by using data from surveys; cost report data from other similar programs, consultation with other service providers

and/or professionals experienced in delivering contracted services; and other sources. The room and board payments for AFC Services are not covered in these reimbursements and will be paid to providers from the client's Supplemental Security Income, less a personal needs allowance.

(B) The reimbursement for Assisted Living/Residential Care (AL/RC) will be determined as a per day reimbursement in accordance with §355.509(a) - (c)(2)(F)(iii) of this title (relating to Reimbursement Methodology for Residential Care). The per day reimbursement for attendant care will be determined, based upon client need for attendant care into six levels of care. A total reimbursement amount will be calculated and the proposed reimbursement is equal to the total reimbursement less the client's room and board payments. The room and board payment is paid to the provider by the client from the client's Supplemental Security Income (SSI), less a personal needs allowance. When the SSI is increased or decreased by the Federal Social Security Administration, the reimbursement for AL/RC will be adjusted in amounts equal to the increase or decrease in SSI received by clients.

(C) The reimbursement for out-of-home respite care provided in a Nursing Facility will be based on the amount determined for the Nursing Facility case mix class into which [~~Texas Index of Level of Effort (TILE) for~~] the CBA participant is classified.

(D) The reimbursement for Personal Care III will be composed of two rate components, one for the direct care cost center and one for the non-direct care cost center.

(i) Direct care costs. The rate component for the direct care cost center will be determined by modeling the cost of the minimum required staffing for the Personal Care III setting, as specified by the Department of Aging and Disability Services, and using staff costs and other statistics from the most recently audited cost reports from providers delivering similar care.

(ii) Non-direct care costs. The rate component for the non-direct care cost center will be equal to the non-attendant portion of the non-apartment assisted living rate per day for non-participants in the Attendant Compensation Rate Enhancement. Providers receiving the Personal Care III rate are not eligible to participate in the Attendant Compensation Rate Enhancement and receive direct care add-on's to the Personal Care III rates.

(3) Monthly reimbursement ceilings. The reimbursement for Emergency Response Services will be determined as monthly reimbursement ceiling, based on the ceiling amount determined in accordance with 40 TAC §52.504 (relating to Reimbursement Methodology for Emergency Response Services (ERS)). The reimbursement for Home-Delivered Meals will be determined on a per meal basis, based on the ceiling amount determined in accordance with 40 TAC §55.45 (relating to Reimbursement Methodology for Home-Delivered Meals).

(4) Requisition fees. Requisition fees are reimbursements paid to the CBA home and community support services contracted providers for their efforts in acquiring adaptive aids and minor home modifications for CBA participants. Reimbursement for adaptive aids and minor home modifications will vary based on the actual cost of the adaptive aid and minor home modification. Reimbursements are determined using a method based on modeled projected expenses which are developed by using data from surveys; cost report data from similar programs; consultation with other service providers and/or professionals experienced in delivering contracted services; and/or other sources.

(5) Pre-enrollment expense fee. Reimbursement for pre-enrollment assessment is determined using a method based on modeled projected expenses that are developed by using data from surveys; cost report data from other similar programs; consultation with other service providers and/or professionals experienced in delivering contracted services; and other sources.

(6) Specialized nursing reimbursement add-on. A specialized nursing reimbursement add-on will be paid in addition to the unit-of-service reimbursements for skilled nursing services provided by an RN or by an LVN. The specialized nursing reimbursement add-on is paid when a client requires, as determined by a physician, daily skilled nursing to cleanse, dress, and suction a tracheostomy or daily skilled nursing assistance with ventilator or respirator care. The client must be unable to do self-care and require the assistance of a nurse for the ventilator, respirator, or tracheostomy care. This specialized nursing reimbursement add-on will be determined in accordance with subsection (c) of this section.

(7) Exceptions to the reimbursement determination methodology. HHSC may adjust reimbursement if new legislation, regulations, or economic factors affect costs, according to §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs).

(e) Authority to determine reimbursement. The authority to determine reimbursement is specified in §355.101 of this title (relating to Introduction).

(f) Reporting of cost.

(1) Cost reporting guidelines. If HHSC requires a cost report for any waiver service in this program, providers must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(2) Excused from submission of cost reports. If required by HHSC, all contracted providers must submit a cost report unless the number of days between the date the first Texas Department of Aging and Disability Services (DADS) client received services and the provider's fiscal year end is 30 days or fewer. The provider may be excused from submitting a cost report if circumstances beyond the control of the provider make cost-report completion impossible, such as the loss of records due to natural disasters or removal of records from the provider's custody by any regulatory agency. An AL/RC provider may also be excused from submitting a cost report if the total number of days serving AL/RC or Residential Care residents is 366 or fewer during its fiscal year. Requests to be excused from submitting a cost report must be received by HHSC before the due date of the cost report.

(3) Number of cost reports to be submitted. Contracted providers are required to submit one cost report per legal entity if all contracts under the legal entity participate in the attendant compensation rate enhancement in accordance with §355.112 of this title (relating to Attendant Compensation Rate Enhancement). Contracted providers who operate both contracts that are participating in the attendant compensation rate enhancement program and contracts that are not participating in the attendant compensation rate enhancement program must file two separate cost reports per legal entity, one report for the contracts that are participating in the attendant compensation rate enhancement program and one cost report for the contracts that are not participating in the attendant compensation rate enhancement.

(4) Reporting and verification of allowable cost.

(A) Providers are responsible for reporting only allowable costs on the cost report, except where cost report instructions indicate that other costs are to be reported in specific lines or sections. Only allowable cost information is used to determine recommended reimbursements. HHSC excludes from reimbursement determination any unallowable expenses included in the cost report and makes the appropriate adjustments to expenses and other information reported by

providers; the purpose is to ensure that the database reflects costs and other information which are necessary for the provision of services, and are consistent with federal and state regulations.

(B) Individual cost reports may not be included in the database used for reimbursement determination if:

(i) there is reasonable doubt as to the accuracy or allowability of a significant part of the information reported; or

(ii) an auditor determines that reported costs are not verifiable.

(C) When material pertinent to proposed reimbursements is made available to the public, the material will include the number of cost reports eliminated from reimbursement determination for the reason stated in subparagraph (B)(i) of this paragraph.

(5) Allowable and unallowable costs. Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs, and Specifications for Allowable and Unallowable Costs), in addition to the following.

(A) Client room and board expenses are not allowable, except for those related to respite care.

(B) The actual cost of adaptive aids and home modifications are not allowable for cost reporting purposes. Allowable labor costs associated with acquiring adaptive aids and home modifications should be reported in the cost report. Any item purchased for participants in this program and reimbursed through a voucher payment system is unallowable for cost reporting purposes. Refer to §355.103(17)(K) of this title (relating to Specifications for Allowable and Unallowable Costs).

(g) Reporting revenue. Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(h) Reviews and field audits of cost reports. Desk reviews or field audits are performed on cost reports for all contracted providers. The frequency and nature of the field audits are determined by HHSC to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments). Providers may request an informal review and, if necessary, an administrative hearing to dispute an action taken under §355.110 of this title (relating to Informal Reviews and Formal Appeals).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 1, 2008.

TRD-200802307
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 424-6576

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TITLE 10. COMMUNITY DEVELOPMENT

PART 6. OFFICE OF RURAL COMMUNITY AFFAIRS

CHAPTER 255. TEXAS COMMUNITY DEVELOPMENT PROGRAM

SUBCHAPTER A. ALLOCATION OF PROGRAM FUNDS

10 TAC §255.7

The Office of Rural Community Affairs (ORCA) proposes amendments to §255.7, concerning the Texas Capital Fund.

The proposed amendments to §255.7 are made to revise certain scoring elements of the Main Street Program and Downtown Revitalization Program. The proposed amendment to §255.7(c) will provide for discretion to permit an applicant with an extenuating circumstance, causing a delay in timely filing of an application by the deadline, to be included in the grant consideration. This proposed amendment will apply to the Main Street Program and Downtown Revitalization Programs, as well as the Texas Capital Fund grants. The proposed amendment to §255.7(h) requires a single application to be submitted to the Texas Department of Agriculture (TDA) and that applications will be evaluated both by the Texas Historical Commission (THC) and TDA. The proposed amendment to §255.7(i) requires poverty information to be based on 2000 Census data and makes other changes to point values and scoring for the Main Street Program. The proposed amendment to §255.7(l) makes changes to point values and scoring for the Downtown Revitalization Program.

Charles (Charlie) S. Stone, Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section, as amended.

Mr. Stone also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the section will be the equitable allocation of CDBG non-entitlement area funds to eligible units of general local government in Texas. There will be no effect on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Karl Young, Finance Programs Coordinator, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposed amendments in the *Texas Register*.

The amendments to §255.7 are proposed under the Texas Government Code §487.052, which provides the Office of Rural Community Affairs with the authority to adopt rules and administrative procedures to carry out the provisions of Chapter 487 of the Texas Government Code.

The Texas Administrative Code, Title 10, Part 6, Chapter 255, is affected by the proposal.

§255.7. Texas Capital Fund.

(a) - (b) (No change.)

(c) Application Dates. The TCF (except for the main street program and the downtown revitalization program) is available up to four times during the year, on a competitive basis, to eligible applicants

statewide. Applications for the main street program and the downtown revitalization program are accepted annually. Applications will not be accepted after 5:00 p.m. on the final day of submission, without extenuating circumstances. The application deadline dates are included in the program guidelines.

(d) - (g) (No change.)

(h) Application process for the main street program. The application and selection procedures consist of the following steps:

(1) Each applicant must submit one [~~two~~] complete application [~~applications~~] to TDA [~~Texas Historical Commission (THC)~~]. No changes to the application are allowed after the application deadline date, unless they are a result of TDA staff recommendations. Any change that occurs will only be considered through the amendment/modification process after the contract is signed.

(2) Upon receipt of the applications, staff from the Texas Historical Commission (THC) and TDA evaluate the [~~THC evaluates~~] applications based on the scoring criteria and rank [~~ranks~~] them in descending order.

(3) - (8) (No change.)

(i) Scoring criteria for the main street program. There is a minimum 25-point threshold requirement. Applications will be reviewed for feasibility and placed in descending order based on the scoring criteria. There is a total of 100 points possible.

(1) In the event of a tie score, the following tie breaker criteria will be used.

(A) The tying applications are ranked from lowest to highest based on the applicant's [~~most recently available~~] annual [~~county~~] poverty rate, using 2000 Census data [~~as provided in Appendix A of the application~~]. Thus, preference is given to the applicant with the higher poverty rate.

(B) (No change.)

(2) Project Feasibility (maximum 45 [~~70~~] points). Measures the applicant's potential for a successful project. Each applicant must submit detailed and complete support documentation for each category. Compliance with the ten criteria for Main Street Recognition is required. First year Main Street Cities must receive prior approval from THC to apply and must submit the Main Street Criteria for Recognition Survey with the TCF application. The criteria include the following:

(A) Broad-based public support for the proposed project--(10 points). Show letters of support from the following:

(i) Score 2 points for one letter from the County Historical Commission (A letter of support from the County Historical Commission is required to receive any points in this category.)

(ii) Score 2 [~~10~~] points for letters from 75% or more of the businesses and/or property owners directly impacted by the proposed project within the designated Main Street district [~~in the proposed Texas Capital Fund project area~~].

(iii) Score 2 points for providing a map indicating location of businesses that have responded with letters under clause (ii) of this subparagraph.

(iv) Score 2 points for a letter from the Historic Preservation Officer, if applicable, or Main Street Manager, describing how the project enhances the community's historic assets and historic preservations goals. This letter should also describe the preservation benefit to the Main Street project area.

(v) Score 2 points for a letter of support from the Economic Development Corporation and/or Chamber of Commerce.

(B) Infrastructure Project Plan--(20 [~~10~~] points). [~~Show the city's plan for dealing with an infrastructure project. Develop a plan for access to local business during the infrastructure project. Provide public notification to support the project.~~]

(i) Score 4 points for providing the city's plan for dealing with an infrastructure project, including a detailed description of how access will be provided to affected businesses during project construction. Score an additional 4 points if this project mitigation plan is signed by the City Engineer, City Manager, or the Mayor (total 8 points).

(ii) Score 5 points for providing a published newspaper article describing the proposed project. The article must include locations of the proposed improvements, proposed timeline for construction, a description of the proposed activities, and how business access will be addressed.

(iii) Score 7 points for providing a letter from the City Engineer or local designee describing all future infrastructure projects, based on 5-year plan, and their potential to have a direct impact to the proposed project and project area. Phased projects should be identified and provide the plan for the proposed phase, as well as for the project in its entirety.

[~~(C) ADA Compliance Goals--(10 points). Does the project address ADA accessibility issues? How will ADA issues be addressed in the project. If project does not address ADA compliance issues, is the Main Street District in compliance with Federal ADA standards. If the project does not address ADA compliance, no points will be awarded for this category. Partial points may be awarded depending upon the degree in which the project addresses ADA compliance issues.~~]

(C) [~~(D)~~] [~~Historic~~] Preservation Ethic [~~and Preservation Impact--Main Street's Role~~] (15 [~~10~~] points). [~~Preservation is a major component of the THC's Main Street program. Officially designated cities are eligible for the Texas Capital Fund grant based on their inclusion in the Texas Main Street program. Points will be awarded if the applicant has successfully addressed the criteria as follows: if the applicant successfully addressed the issue of enhancing historic assets and/or historic preservation goals, up to 5 points may be awarded. If the applicant has demonstrated that they have a current historic preservation ordinance, up to 3 points may be awarded based upon the content of the ordinance. Up to 2 points may be awarded for historic preservation-related programs or incentives. The THC mission is "To protect and preserve the state's historic and prehistoric resources for the use, education, enjoyment and economic benefit of present and future generations." Therefore, in the interest of accomplishing our mission, please answer the following:~~]

(i) Score 2 points if there have been no historic building demolitions within your Main Street project area during the past five years, unless approved by the THC. If you have had any building demolitions in the past five years, what was the age of the building(s) that were demolished?

(ii) Score 4 points if the city has a current historic preservation ordinance. Please provide documentation.

(iii) Score 4 points if the city has design guidelines for the Main Street program or project area. Please provide documentation.

(iv) Score 3 points if the city has participated in other THC programs (e.g., CLG, VIP, and NRHP). (1 point award for participation in each program up to a maximum of 3 points).

(v) Score 2 points if the city has participated in other non-THC historic preservation-related programs or incentives? Please provide documentation of the individual programs. (1 point will be awarded for participation in each non-THC program up to a maximum of 2 points).

~~[*(i)* Describe how the proposed Texas Capital Fund project enhances your historic assets or historic preservation goals.]~~

~~[*(ii)* Does the city have a current historic preservation ordinance?]~~

~~[*(iii)* Does the city have any historic preservation related programs or incentives?]~~

~~[*(iv)* List any building demolitions within your Main Street project area during the past five years. If you had any building demolitions in the past five years, what was the age of the buildings that were demolished?]~~

~~[(E) State Enterprise Zone and Economic Development Consideration--(10 points) Four points will be awarded if the city has a nominated or active Enterprise Zone project. Three points will be awarded if the city has the economic development sales tax (4A, 4B or both). Three points may be awarded for other viable economic development programs the city offers in order to further realize its full economic development potential. Please document any other economic development programs and strategies that your city is engaged in.]~~

~~[(F) Community Size--(10 points). Score 5 points if the population of the city is 12,000 or less; score additional 5 points if the population is less than 4,000, using 2000 census data. City population figures are net of the population held in adult or juvenile correctional institutions, as shown by the 2000 census data.]~~

~~[(G) Main Street Program Participation--(5 points). Points are awarded on the applicant's continuous participation in the Main Street program as follows: For every two years of continuous participation in the Main Street program, the applicant will be awarded 1 point. Points will only be awarded for every two consecutive years and will not be broken into half points for increments other than two-year increments. If a city leaves the Main Street program and then returns at a later date, "continuous participation" will be calculated from the date that they returned to the program. Applicants will receive the maximum amount of points if they have participated in the program for 10 continuous years.]~~

~~[(H) Texas Capital Fund Grant Training--(5 points). Has a city representative attended a Texas Capital Fund Main Street Improvements grant training workshop? At least one training workshop is held prior to each application deadline. List the date attended and the location. If the city is retaining a paid consultant to prepare the application, a city representative will still be required to attend training in order to receive the points in the category.]~~

(3) Applicant (maximum 55 ~~[30]~~ points). There are five ~~[three]~~ applicant scoring categories each worth 5 to 20 ~~[10]~~ points.

(A) Minority Hiring (maximum 10 points). Measures applicant's hiring practices. Percentage of minorities presently employed by the applicant divided by the percentage of minority residents within the local community. ~~[Score 10 points if the applicant's minority employment rate is equal to or greater than the applicant's community minority rate.]~~

(i) Score 2 points if this equals 80% or more;

(ii) Score 4 points if this equals 85% or more;

(iii) Score 6 points if this equals 90% or more;

(iv) Score 8 points if this equals 95% or more;

(v) Score 10 points if this equals 100% or more.

(B) Leverage/Match (maximum 10 points). A 10% cash match is required for the grant. Additional points will be given for additional matching funds. 10% additional match equals 5 points. 20% additional match equals 10 points. The additional match can be cash and in-kind.

(C) Economic Development Consideration--(10 points)

(i) Poverty Rate--Scored if the county annual rate, using 2000 Census data, is higher than the annual state rate, as follows: score 2 points if their county rate meets or exceeds the state average and score 4 points if this rate is 15% over the state average.

(ii) Score 3 points if the city has adopted the 4A, 4B, or both 4A and 4B economic development sales tax.

(iii) Score 3 points if the city has a Tax Increment Financing Zone, a Main Street low interest loan program, or a grant program that specifically impacts the Main Street district.

(D) Community Size--(5 points). Score 3 points if the population of the city is 12,000 or less; score additional 2 points if the population is less than 4,000, using 2000 census data. City population figures are net of the population held in adult or juvenile correctional institutions, and use 2000 census data.

(E) Main Street Program Participation--(20 points).

(i) Score 1 point for every two years of continuous participation in the THC Main Street program up to a maximum of 10 years and 5 points. Points will only be awarded for every two consecutive years and will not be broken into half points for increments other than two-year increments. If a city leaves the Main Street program and then returns at a later date, "continuous participation" will be calculated form the date that they returned to the program.

(ii) Score 15 points if a city official/employee has attended a Texas Capital Fund, Main Street Improvements grant training workshop. At least one training workshop is held prior to each application deadline. List the date attended and the location. If the city is retaining a paid consultant to write the grant application, a city representative will still be required to attend training in order to receive the points in this category.

~~[(C) Main Street Standing (maximum 10 points). If the Main Street program received National Recognition the prior year, 10 points will be awarded.]~~

(j) - (k) (No change.)

(l) Scoring criteria for the downtown revitalization program. There are a total of 100 points.

(1) (No change.)

(2) Maximum 100 points.

(A) - (B) (No change.)

~~[(C) Enterprise/Empowerment/Defense Zone (maximum 5 points). A project located in a state designated enterprise zone, federal enterprise community, federal empowerment zone, or defense zone receives these five points.]~~

(C) [~~(D)~~] Previous Contracts (Maximum 10 points). Award 5 points if the community has been awarded one contract in

the current calendar year or preceding 2 calendar years. Award 10 points if the community has been awarded zero contracts in the current calendar year or the preceding 2 calendar years.

(D) [~~(E)~~] Community Population (maximum 10 points). Points are awarded to applying cities with populations of 5,050 or less, using 2000 census data. Score 5 points if the city is located in a county with a population of 35,000 or less; and score 5 additional points if the population of the city is less than 5,050. Community population figures are net of the population held in adult or juvenile correctional institutions, as shown by the 2000 census data.

(E) [~~(F)~~] Per Capita Income (maximum 10 points). Awarded to cities that have a per capita income below $19,617.

(F) [~~(G)~~] Leverage/Match (maximum 10 points). A 10% cash match is required for the grant. Additional points will be given for additional matching funds. 10% additional match equals 5 points. 20% additional match equals 10 points. The additional match can be cash and in-kind.

(G) [~~(H)~~] Minority Hiring (maximum 10 points). Measures applicant's hiring practices. Award 5 points if the city's minority employment rate is equal to or greater than the community minority percentages rate. Award 10 points if the city's minority employment rate is equal to or greater than 125% of the community minority percentage rate or in cities where the minority population is 80% or greater, the applicant must employ 95% minorities.

(H) Score 10 points if a city official/employee has attended a Texas Capital Fund Main Street Improvements and/or Downtown Revitalization Program application training workshop. At least one training workshop is held prior to the application deadline. List the date attended and the location. If the city is retaining a paid consultant to write the grant application, a city representative will still be required to attend training in order to receive the points in this category.

~~[(I) Commercial Support (maximum 10 points). Award 5 points for letters from 50% or more of the businesses in the Downtown Revitalization area. Award 10 points for letters from 75% of the businesses in the Downtown Revitalization area.]~~

(I) [~~(J)~~] Sidewalks and ADA Compliance (15 [~~10~~] points). Points awarded if a minimum of 70% of the requested funds will be used for sidewalk and/or ADA compliance activities.

(m) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 5, 2008.

TRD-200802358
Charles (Charlie) S. Stone
Executive Director
Office of Rural Community Affairs
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 936-6734

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PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 303. REGISTRATION

SUBCHAPTER A. REGISTRATION OF BUILDERS

10 TAC §303.20

The Texas Residential Construction Commission ("commission") proposes new §303.20, which sets forth the requirements for continuing education for all registered builders and remodelers. The new section will implement changes to the commission's enabling Act by describing builder continuing education requirements, the procedure for fulfilling them, the process for education sponsors to seek a determination of course eligibility for credit and the obligations of the commission in that process.

Susan K. Durso, General Counsel for the commission, has determined that for each year of the first five year period that the proposed rule is in effect there will be a modest increase in expenditures or revenue for state government contemplated by House Bill 1038, an Act passed in the 80th Texas Legislature, Regular Session, and provided for in the state budget through additional personnel to implement this continuing education program. There will be no fiscal impact for local government as a result of enforcing or administering the section.

Ms. Durso has also determined that for each year of the first five year period the proposed rule is in effect the public will benefit from the assurance that builders and remodelers in this state receive continuing education to stay abreast of changes in the industry.

Ms. Durso has also determined that for each year of the first five-year period the proposed rule is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Ms. Durso has also determined that for each year of the first five-year period the proposed rule is in effect there will be an insignificant adverse economic impact on small business to the extent that maintaining the continuing education requirements may require the expenditure of funds. Continuing education for a participant in the residential construction industry is required by state law. However, the proposed section includes options for accruing some of the continuing education requirements through self-study and through participation in meetings of trade organizations, to which the small businesses are likely to belong. Therefore, to the extent possible, the commission has provided methods for registered builders and remodelers to obtain the requisite continuing education credits without a significant expenditure of funds.

Interested persons may send written comments regarding the new section to the Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78711-3509. Comments regarding the proposed section will be accepted for 30 days following the date of publication in the *Texas Register*. Thereafter, the comments will not be considered as timely filed. Comments may also be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Continuing Education Requirements" in the subject line. Comments submitted electronically to another address or with a different subject line may not be considered.

The new section is proposed pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code and Property Code §416.012.

No other statutes, articles or codes are affected by the proposed section.

§303.20. Required Builder/Remodeler Continuing Education.

(a) A person registered under this subchapter (registrant) must earn at least five hours of eligible continuing education credit in each applicable reporting period as further described in subsections (e) and (f) of this section. A registrant can earn continuing education credit for educational, technical, ethical, or professional management activities related to the practice of residential construction, including:

(1) successfully completing or auditing a course sponsored by an institution of higher education, including a correspondence course;

(2) successfully completing a course sponsored by a professional or trade organization, including a correspondence course;

(3) attending a seminar, tutorial, short course, videotaped course, or televised course on the practice of residential construction;

(4) participating in an in-house course sponsored by a corporation or other business entity;

(5) teaching a course described by paragraphs (1) - (4) of this subsection;

(6) publishing an article, paper, or book on the practice of residential construction;

(7) making or attending a presentation on residential construction practices, including technical, ethical, or professional management activities related to the practice of residential construction made at a meeting of a residential or builder association or organization or writing a paper on such a topic for presentation at the meeting;

(8) participating in the business activities of a residential or builder association, including serving on a committee of the organization; and

(9) engaging in self-directed study of the practice of residential construction.

(b) Continuing education credit hours are computed based on actual time spent participating in an eligible course, program, or activity.

(c) The continuing education credit hours required per applicable reporting period under this section must include at least:

(1) one hour of ethics, which may not be earned through self-study; and

(2) two hours of education that address:

(A) limited statutory warranties;

(B) building and performance standards; and

(C) requirements of the International Residential Code as adopted under Property Code §430.001 and other statutes and rules that apply to builders Title 16 of the Property Code.

(d) A registrant may not satisfy more than:

(1) two credit hours of the five hour minimum continuing education requirement in a reporting period for engaging in self-directed study, which may be fulfilled by:

(A) reading materials and completing the course work specifically prepared for an accredited course without attending the course;

(B) reading substantive residential construction articles in recognized home builder publications;

(C) viewing videotapes or digital media produced for instruction of the residential construction industry;

(D) listening to audiotapes or digital media produced for instruction of the residential construction industry; and

(E) reading materials specifically designed to instruct professionals on the proper use and installation of materials designed for use in residential construction; and

(2) one credit hour of the five hour minimum continuing education requirement in a reporting period by participating in the activities of a residential or builder association, including serving on a committee of the organization as described by subsection (a)(8) of this section.

(e) A registrant that registers with the commission for the first time on or after September 1, 2007:

(1) must earn five hours of continuing education credit within twelve months of the date of the initial registration; and

(2) must earn an additional five hours of continuing education credit every five years thereafter to remain in good standing.

(f) A registrant that was registered with the commission before September 1, 2007 and whose certificate of registration was in good standing on September 1, 2007:

(1) must earn five hours of continuing education credit by August 31, 2012; and

(2) must earn an additional five hours of continuing education credit every five years thereafter to remain in good standing.

(g) Each registrant must timely show proof of completion of the required credit hours in order to renew its registration and to maintain its certificate of registration in good standing.

(1) A course sponsor's failure to timely submit a registrant's proof of attendance at an eligible continuing education course is not an excuse for the registrant's failure to timely report its compliance.

(2) Registrants who fail to comply timely with the minimum continuing education requirements in violation of this section shall be given a notice of the intent to impose a suspension of their certificate of registration or, if the deadline for compliance with the requirements of this section coincides with the registrant's registration renewal deadline, the application for renewal will be denied.

(A) The notice shall clearly state the reason for the action taken under paragraph (2) of this subsection and shall provide the registrant thirty days within which to come into compliance with the requirements of this section or to appeal the suspension or denial as stated in the notice.

(B) The notice will be sent to the registrant's official mailing address of record.

(h) Reinstatement of Registration Status.

(1) A registrant whose certificate of registration has been suspended for a violation of this section may seek reinstatement after completing the required continuing education hours for the compliance period by submitting a written request for reinstatement of its certificate of registration.

(2) A registrant whose application for renewal is denied under this section may file an application for late renewal with proof of compliance with this section pursuant to §303.19 of this chapter.

(3) Credit hours earned during the period of non-compliance may not also be reported for credit toward the minimum credit hours required during the next compliance period.

(4) A registrant that fails to timely renew or whose certificate of registration is suspended may not continue to act as a builder or remodeler until their registration has been restored to a status in good standing.

(i) Continuing Education Eligibility Review.

(1) A course, program or activity must be submitted to the commission for review and confirmation of eligibility for credit to fulfill the requirements of this section.

(2) A registrant or course sponsor may submit continuing education credit information to the commission.

(3) The burden of proof that a course, program or activity meets the requirements of this section rests with the sponsor or registrant that submits the request for eligibility review.

(4) Continuing education credit information must be submitted to the commission and may be submitted via:

(A) a commission-approved form with the information as specified in paragraph (7) of this subsection;

(B) if provided by the commission, an internet portal designated for such submission; or

(C) any other attendance submission format approved by the commission.

(5) A separate request is required for each course or program unless it is being repeated in exactly the same format on different dates and locations.

(6) A registrant may submit a request for credit under this section.

(A) For a course not reviewed for eligibility prior to the date of the course, a registrant may submit a request for credit by submitting a course review form, which must include the name of the course, the name of the course sponsor, a copy of the agenda, a the length of each presentation including a brief description of the materials, and if the course is presented by one or more instructors or speakers, a list of speakers and copy of each speaker's curriculum vitae, resume or other evidence of qualifications to teach the subject matter, and a commission approved self-certification of attendance for the requested number of credit hours.

(B) For courses previously reviewed by the commission, a registrant may submit within thirty days from the date the course was attended an attendance form issued by the program sponsor that includes the course name, builder name, builder number, attendee name, attendance date, and commission-assigned course number.

(C) To receive credit for activities related to participation in the activities of a residential or builder association under subsection (a)(8) of this section, the registrant shall submit to the commission written verification of participation on association letterhead from the president or executive officer of the association or its designee.

(7) In order for the commission to list a program or course on its website, a program sponsor must submit its request for review at least 30 days in advance of the course or program and shall:

(A) submit the request on a form provided by the commission;

(B) submit all information and supporting documentation requested on the form, including:

(i) a sample brochure, agenda or program outline that describes the content, identifies the instructors, lists the time devoted to each topic and shows each date and location at which the program will be offered;

(ii) a calculation of the total number of continuing education hour credit to be satisfied by attendance;

(iii) include a method of presentation;

(iv) if the materials will be presented by one or more instructors or speakers, a resume, curriculum vitae, or other evidence demonstrating the qualifications of the instructors or presenters presenting the material; and

(v) registration contact and registration fee information that includes the sponsor's name, telephone and website address.

(8) Ethics courses previously approved and offered by the Texas State Bar Association, a nationally recognized professional organization, or an accredited Texas institution of higher learning are deemed eligible for continuing education credit upon submission of a request for credit.

(j) Upon a determination of eligibility for credit of a course submitted by a course sponsor, the commission within ten business days will:

(1) issue course numbers;

(2) post course or program information and contact information to the commission website, if the course or program is publicly offered; and

(3) provide attendance sheets to the course sponsor.

(k) Credit shall not unreasonably be withheld once complete information for eligibility determination as required under this section is received by the commission.

(l) The commission will remove courses and programs listed on its website within 30 days of receipt of a written request from the course sponsor.

(m) Registrants may not carry forward continuing education credit hours in excess of the required five-hour minimum from one reporting period to the next.

(n) A registrant that is a not an individual must designate an individual to earn the continuing education credit hours required under this section by submitting the name of the designated individual to the commission's registration department on the form provided for submitting earned continuing education credit information.

(1) An individual designated by registrant under this subsection must be either the registrant's primary registered agent or an individual employee involved in on-site construction activities who is responsible for residential construction activities that take place at the residential construction job site, including:

(A) acting as a project manager, superintendent, or foreman;

(B) supervising construction crews or subcontractors;

(C) scheduling the work of construction crews or subcontractors;

(D) inspecting the construction work of crews or subcontractors; or

(E) inventorying and inspecting the delivery of construction materials to the job site; or

(F) serving as an in-house construction trainer.

(2) All required credit hours earned in a single reporting period must be earned by the individual designated under this subsection except as provided in paragraph (3) of this subsection or unless undue hardship or good cause is established pursuant to subsection (o) of this section.

(3) If a registrant's designee leaves the employment of the registrant or becomes employed by another registrant, hours of credit earned remain with the original registrant.

(4) If a registrant or a registrant's designee is also an individual designated to earn continuing education credits for Texas Star Builder membership, credits earned under this section can be used as continuing education credit hours to satisfy the requirements of §303.300 of this chapter.

(o) Any registrant that is unable to satisfy the minimum continuing education requirements of this section during any reporting period may request a finding of undue hardship or good cause for failure to comply.

(1) A registrant may seek an extension of time to complete the requirements of this section for failure to comply due to undue hardship caused by illness, medical disability, or other extraordinary or extenuating circumstances beyond the control of the registrant.

(A) A request for extension for undue hardship must be accompanied by substantiating third-party documentation.

(B) An extension for undue hardship will be granted for a period of ninety days, unless a greater extension is approved by the Executive Director.

(2) A registrant that was unable to comply with this section for good cause may submit a request for a waiver of compliance to the Executive Director.

(A) The burden is on the registrant to demonstrate that good cause exists for failure to comply.

(B) A waiver granted by the Executive Director is a final agency decision not subject to further administrative appeal.

(3) Good cause or undue hardship shall not include: financial hardship, lack of time due to professional or personal schedule, or lack of information concerning continuing education requirements.

(4) A course sponsor's failure to timely submit a registrant's proof of attendance is not an excuse for the registrant's failure to timely report its compliance.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 28, 2008.

TRD-200802226
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 463-2886

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CHAPTER 304. WARRANTIES AND BUILDING AND PERFORMANCE STANDARDS

SUBCHAPTER B. PERFORMANCE STANDARDS FOR COMPONENTS OF A HOME SUBJECT TO A MINIMUM WARRANTY OF ONE YEAR FOR WORKMANSHIP AND MATERIALS

10 TAC §§304.10, 304.12, 304.14, 304.19, 304.20, 304.25, 304.28, 304.32

The Texas Residential Construction Commission ("commission") proposes amendments to §304.10, concerning the standard for flaking of plaster adhesive on concrete slabs; §304.12, concerning nail holes in drywalls; §304.14, concerning gaps in siding and joints on exterior trim; §304.19, concerning carpet seams; §304.20, concerning the evenness of hard flooring; §304.25, concerning interior trim joints; §304.28, concerning the delaminating of counter top materials; and §304.32 concerning yard grading and standing water after unusually heavy rainfall. The commission is proposing these amendments to better define the performance standard for components of a home subject to a minimum warranty of one year for workmanship and materials.

Susan K. Durso, General Counsel, has determined that for each year of the first five-year period that the amendments are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect the public will benefit from having more complete and clearer understanding of the performance standards.

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there will be no significant effect on individuals or large, small, and micro-businesses as a result of the proposed amendments

Ms. Durso has also determined that for each year of the first five-year period the proposed amendments are in effect there will be no adverse economic effect on small businesses. Therefore, no regulatory flexibility analysis is necessary.

Interested persons may submit written comments (12 copies) on the proposed amendments to Susan K. Durso, General Counsel, Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78701-3509. The deadline for submission of comments is 30 days from the date of publication of the proposed amendments in the *Texas Register*. Comments received after that date will not be considered. Comments should be arranged in the manner consistent with the organization of the amendments. Comments may be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Performance Standards" in the subject line with the chapter number. Comments submitted electronically that are sent to a different address or that do not have "Performance Standards" in the subject line may not be considered.

The amendments are proposed pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of the Act, and §430.001, which requires the commission to adopt building and performance standards for residential construction.

No other statutes, articles, or codes are affected by the proposed amendments.

§304.10. Performance Standards for Foundations and Slabs.

(a) - (b) (No change.)

(c) Performance Standards for Exterior Concrete including Patios, Stem Walls, Driveways, Stairs or Walkways.

(1) - (11) (No change.)

(12) Plaster adhesive over concrete slab underpinning shall not flake off more than one square foot in one spot within 36 square inches or more than 3 feet over the entire surface of the home.

§304.12. Performance Standards for Drywall.

(a) - (f) (No change.)

(g) Nails or screws shall not be visible in a drywall surface from a distance of 6 feet under normal lighting conditions. If nails or screws are visible, the builder shall take such action as is necessary to bring the variance within the standard.

§304.14. Performance Standards for Exterior Siding and Trim.

(a) Performance Standards for Exterior Siding.

(1) (No change.)

(2) Siding shall not gap or bow. A siding end joint shall not have a gap that leaks or that equals or exceeds 1/4 of an inch in width. Siding end joint gaps shall be caulked. A bow in siding shall not equal or exceed 3/8 of an inch out of line in a 32-inch measurement. If siding has gaps or bows that exceed the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) - (8) (No change.)

(b) Performance Standards for Exterior Trim.

(1) A joint between two trim pieces shall not have a separation that leaks or is [~~at the joint~~] equal to or exceeding 1/4 of an inch in width and all trim joints shall be caulked. If there is a separation at a trim joint that fails to comply with the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) - (6) (No change.)

§304.19. Performance Standards for Interior Flooring.

(a) (No change.)

(b) Performance Standards for Carpet.

(1) (No change.)

(2) Carpet seams may be visible but shall be smooth without a gap or overlap. If the carpet fails to meet the standards stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(3) (No change.)

(c) - (e) (No change.)

§304.20. Performance Standards for Hard Surfaces, including Ceramic Tile, Flagstone, Marble, Granite, Slate, Quarry Tile, Finished Concrete or Other Hard Surfaces.

(a) Performance Standards for Hard Surfaces Generally.

(1) - (8) (No change.)

(9) Hard surface floors located in a living space that is not otherwise designed for drainage, shall not have pits, depressions, or unevenness that equals or exceeds 3/8 of an inch in any 32 inches.

(A) If a finished hard surface floor located in a living space fails to meet the standard stated in paragraph (1) of this subsection, the builder shall take such action as is necessary to bring the variance within the standard.

(B) Finished hard surface floors located in living spaces that are designed for drainage, such as a laundry room, are excepted from the standards stated in paragraph (1) of this subsection.

(b) - (c) (No change.)

§304.25. Performance Standards for Interior Trim.

(a) Performance Standards for Trim.

(1) An interior trim joint separation shall not equal or exceed 1/8 of an inch in width or shall not separate from adjacent surfaces equal to or in excess of 1/8 inch and all joints shall be caulked or puttied. If an interior trim joint fails to meet the standard stated in this paragraph, the builder shall take such action as is necessary to bring the variance within the standard.

(2) - (4) (No change.)

(b) (No change.)

(c) Performance Standard for Cabinet Doors. Cabinet doors shall open and close with reasonable ease. Cabinet doors shall be even and shall not warp more than 1/4 inch when measured from the face to the point of the furthermost point of the door or drawer front when closed. Some warping, cupping, bowing or twisting is normal caused by surface temperature and humidity changes.

§304.28. Performance Standards for Countertops and Backsplashes.

(a) Performance Standards for Countertops and Backsplashes Generally.

(1) - (5) (No change.)

(6) Counter and vanity top material should not delaminate. If a countertop fails to meet the standard stated in this paragraph, the builder will take such action as is necessary to bring the variance within the standard.

(b) (No change.)

§304.32. Performance Standards for Yard Grading.

(a) Yards shall have grades and swales that provide for proper drainage away from the home in accordance with the Code or other governmental regulations.

(1) (No change.)

(2) The homeowner shall maintain the drainage pattern and protect the grading contours from erosion, blockage, over-saturation or any other changes. The possibility of standing water, not immediately adjacent to the foundation but in the yard, after prolonged or an unusually heavy rainfall event should be anticipated by the homeowner.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 28, 2008.

TRD-200802225
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 463-2886

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TITLE 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 37. LEGAL
SUBCHAPTER B. PENALTIES

16 TAC §37.60

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Alcoholic Beverage Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Alcoholic Beverage Commission (commission) proposes the repeal of §37.60, relating to the Standard Penalty Chart.

This rule will be replaced by proposed new rules under a new chapter 34 and will no longer be necessary after the new chapter is adopted.

Lou Bright, General Counsel, has determined that for each of the first five years that the proposed repeal is in effect there will be no fiscal impact on units of state or local government as a result of this repeal.

Lou Bright, General Counsel, has determined that for each of the first five years following the proposed repeal of the rule there will be no fiscal impact on small and micro-businesses and individuals who will no longer be required to comply with the sections.

Lou Bright, General Counsel, has determined that for each of the first five years following the proposed repeal of the rule there will be no public benefit from the repeal.

Comments on the proposed repeal may be addressed to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711. Comments will be accepted for 45 days following publication of the repeal in the *Texas Register*.

The proposed repeal of the rule is authorized by §5.31 and §5.362 of the Alcoholic Beverage Code. Section 5.31 gives the commission authority to prescribe and publish rules necessary to carry out the provisions of the Code. Section 5.362 provides the specific authority to adopt a schedule of sanctions that may be imposed for a violation of the Code.

Cross Reference: Sections 5.31, 5.362, 11.64, 11.641, 61.76 and 61.761 of the Alcoholic Beverage Code will be affected by this repeal.

§37.60. Standard Penalty Chart.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 2, 2008.

TRD-200802344
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 206-3204

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY
SUBCHAPTER AA. ACCOUNTABILITY AND PERFORMANCE MONITORING

19 TAC §97.1005

(Editor's note: In accordance with Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §97.1005 is not included in the print version of the Texas Register. The figure is available in the on-line edition of the May 16, 2008, issue of the Texas Register.)

The Texas Education Agency (TEA) proposes an amendment to §97.1005, concerning accountability and performance monitoring. The section describes the purpose of the Performance-Based Monitoring Analysis System (PBMAS) and manner in which school districts and charter school performance is reported. The section also adopts the most recently published PBMAS Manual. The proposed amendment would adopt applicable excerpts of the Performance-Based Monitoring Analysis System 2008 Manual. Earlier versions of the manual will remain in effect with respect to the school years for which they were developed.

House Bill 3459, 78th Texas Legislature, 2003, added the Texas Education Code (TEC), §7.027, limiting and redirecting monitoring done by the TEA to that required to ensure school district and charter school compliance with federal law and regulations; financial accountability, including compliance with grant requirements; and data integrity for purposes of the Public Education Information Management System (PEIMS) and accountability under TEC, Chapter 39. Legislation passed in 2005 renumbered TEC, §7.027, to TEC, §7.028. To meet this monitoring requirement, the agency developed the PBMAS, which is used in conjunction with other evaluation systems, to monitor performance and program effectiveness of special programs in school districts and charter schools.

Agency legal counsel has determined that the commissioner of education should take formal rulemaking action to place into the *Texas Administrative Code* procedures related to the PBMAS. Given the statewide application of the PBMAS and the existence of sufficient statutory authority for the commissioner of education to formally adopt rules in this area, portions of each annual PBMAS Manual have been adopted since the first PBMAS Manual was developed in 2004-2005. The PBMAS evolves from year to year, and the intent is to annually update 19 TAC §97.1005 to refer to the most recently published PBMAS Manual.

The proposed amendment to 19 TAC §97.1005 would update the current rule by adopting excerpted sections of the PBMAS 2008 Manual. These excerpted sections describe the specific criteria and calculations that will be used to assign 2008 PBMAS performance levels.

The 2008 PBMAS includes several key changes from the 2007 system. Texas Assessment of Knowledge and Skills (TAKS) (Accommodated) results for English Language Arts (Grade 11),

Mathematics (Grade 11), Science (Grades 5, 8, 10, and 11), Science (Grade 5 Spanish), and Social Studies (Grades 8, 10, and 11) have been incorporated into TAKS performance indicators as appropriate. TAKS Grade 8 Science results have also been incorporated into all TAKS performance indicators. As a result of the Texas English Language Proficiency Assessment System (TELPAS) standard setting timeline, the Reading Proficiency Test in English (RPTE) Multi-Year Beginning Proficiency Level Rate indicator used in the 2007 PBMAS has been suspended and will be reinstated with the 2009 PBMAS. No Child Left Behind (NCLB) Indicator #1(i-ii) used in the 2007 PBMAS has been replaced with Title I, Part A TAKS passing rate indicators in Mathematics, Reading/ELA, Science, Social Studies, and Writing. In addition, three new Title I, Part A Report Only indicators have been added to the NCLB program area.

A new indicator to measure potential disproportionate out-of-school suspensions of students with disabilities has been added to the special education program area. Several new or revised participation indicators are being implemented in the 2008 PBMAS. These indicators measure students' participation in TAKS, TAKS (Accommodated), TAKS-Modified, and TAKS-Alternate. Finally, adjustments have been made to the performance level cut points for all PBMAS TAKS performance indicators, and a hold harmless provision has been added to the special education program area to address the impact of the phase-in of TAKS (Accommodated) and Grade 8 Science results into the 2008 PBMAS. Changes to the PBMAS indicators for 2008 are marked in the manual as *"New!"* for easy reference.

The proposed amendment would also modify subsection (d) to specify that the PBMAS Manual adopted for the school years prior to 2008-2009 will remain in effect with respect to those school years.

Criss Cloudt, associate commissioner for assessment, accountability, and data quality, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state and local government as a result of enforcing or administering the amendment.

Dr. Cloudt has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be to continue to inform the public of the existence of annual manuals specifying PBMAS procedures by including this rule in the *Texas Administrative Code*. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins May 16, 2008, and ends June 15, 2008. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on May 16, 2008.

The amendment is proposed under the Texas Education Code, §7.028, which authorizes the agency to monitor as necessary to ensure school district and charter school compliance with state and federal law and regulations.

The amendment implements the Texas Education Code, §7.028.

§97.1005. Performance-Based Monitoring Analysis System.

(a) In accordance with Texas Education Code, §7.028(a), the purpose of the Performance-Based Monitoring Analysis System (PBMAS) is to report annually on the performance of school districts and charter schools in selected program areas: bilingual education/English as a Second Language, career and technical education, special education, and certain Title programs under the federal No Child Left Behind Act. The performance of a school district or charter school is reported through indicators of student performance and program effectiveness and corresponding performance levels established by the commissioner of education.

(b) The assignment of performance levels for school districts and charter schools in the 2008 [~~2007~~] PBMAS is based on specific criteria and calculations, which are described in excerpted sections of the PBMAS 2008 [~~2007~~] Manual provided in this subsection.
Figure: 19 TAC §97.1005(b)
[~~Figure: 19 TAC §97.1005(b)~~]

(c) The specific criteria and calculations used in the PBMAS are established annually by the commissioner of education and communicated to all school districts and charter schools.

(d) The specific criteria and calculations used in the annual PBMAS manual adopted for the school years prior to 2008-2009 [~~2007-2008~~] remain in effect for all purposes, including accountability and performance monitoring, data standards, and audits, with respect to those school years.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 5, 2008.

TRD-200802346
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 335. PROFESSIONAL TITLE

22 TAC §335.1

The Texas Board of Physical Therapy Examiners proposes amendments to §335.1, concerning Licensed Physical Therapist/Licensed Physical Therapist Assistant. The amendments describe proper usage of the titles PT and PTA, and formalize requirements for the use of the title "doctor" by physical therapists.

The Board previously proposed and withdrew amendments to this section. In the previous proposed amendment, PTs using the

affix "Doctor" would have been required to go further in clarifying the basis for their use of the term. The Texas Physical Therapy Association (TPTA) commented unfavorably on that proposed amendment. The TPTA suggested that the previous proposal exceeded the legal requirements in the Healing Arts Identification Act. It also stated that the rule was too broad and would affect PTs with doctorates financially. Also, a comment was received from the Texas Osteopathic Medical Association ("TOMA") and the American Osteopathic Association ("AOA"). TOMA and AOA stated that authorizing physical therapists with doctorates to refer to themselves as "doctors" is unwarranted, and would result in confusion among patients. In response, the Board cites §104.004 of the Healing Arts Identification Act, which gives a person with a doctoral degree the authority to use the title granted by the degree, as long as he designates the authority under which the title is used or the college or honorary degree that gives rise to the use of the title. The Board believes this current proposal, which uses the language from the Healing Arts Identification Act, makes it clear that the use of the title "doctor" by a PT with a doctorate requires identification of the degree, and at the same time does not place an undue burden on the PT who uses a title which has been granted by an appropriately accredited institution.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline also has determined that, for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be better understanding by licensees and the public of licensure designation, and more clarity about the use of the title "doctor" by physical therapists. The agency does not expect any financial impact on small businesses. No economic cost to persons having to comply is anticipated.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us.

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by the amendments.

§335.1. Licensed Physical Therapist/Licensed Physical Therapist Assistant.

(a) A licensed physical therapist shall use the title physical therapist or the initials PT. A licensed physical therapist assistant shall use the title physical therapist assistant or the initials PTA. No other titles or initials are conferred by a license from this board. [~~The licensed physical therapist may use the title physical therapist with the initials PT. The licensed physical therapist assistant may use the title physical therapist assistant with the initials PTA.~~]

(b) Any letters designating other titles, academic degrees, or certifications must follow the initials PT or PTA (example: Jane Doe, PT, DPT).

(c) In using the title "doctor" as a trade or professional asset or on any manner of professional identification, including a sign, pamphlet, stationery, or letterhead, or as a part of a signature, a physical therapist shall designate the college or honorary degree that gives rise to the use of the title, or the authority under which the title is used.

(d) A degree described in subsection (b) of this section shall be granted by an institution accredited by an accrediting agency recognized by the National Commission on Accrediting or the US Department of Education.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 1, 2008.

TRD-200802305

John P. Maline

Executive Director, Executive Council of Physical Therapy and Occupational Therapy Examiners

Texas Board of Physical Therapy Examiners

Earliest possible date of adoption: June 15, 2008

For further information, please call: (512) 305-6900

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CHAPTER 347. REGISTRATION OF PHYSICAL THERAPY FACILITIES

22 TAC §347.5

The Texas Board of Physical Therapy Examiners proposes amendments to §347.5, concerning Requirements for Registered Facilities. The amendment clarifies what the owner of a facility must do when the physical address or name of a facility is changed.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline also has determined that, for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be clearer instructions for facility owners. The agency does not expect any financial impact on small businesses, as facilities have been complying with this requirement though it has not been clearly stated in rule previously. No economic cost to persons having to comply is anticipated.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us.

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by the amendments.

§347.5. Requirements for Registered Facilities.

(a) - (c) (No change.)

(d) A registered facility must notify the board within 30 days of any change to the name, physical/street address or mailing address. In the event of a name or physical address change, the owner must ob-

tain a new registration certificate and renewal certificate (if applicable), showing the correct information.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 1, 2008.

TRD-200802304
John P. Maline
Executive Director, Executive Council of Physical Therapy and Occupational Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 305-6900

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. GENERAL PROVISIONS
SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §535.222

The Texas Real Estate Commission (TREC) proposes new §535.222, concerning inspection reports. The new rule clarifies the inspection reporting requirements as recommended by the Texas Real Estate Inspector Committee, an advisory committee of six professional inspectors and three public members appointed by TREC. The new rule clarifies that all inspections performed pursuant to an inspector license issued by TREC must be reported in writing and establishes general requirements regarding information contained in the report and delivery to the client.

Devon V. Bijansky, Assistant General Counsel, has determined that for the first five-year period the new rule is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the new rule. There is no anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the new rule. There is no anticipated economic cost to persons who are required to comply with the proposed new rule.

Ms. Bijansky also has determined that for each year of the first five years the new rule as proposed is in effect, the public benefit anticipated as a result of enforcing the new rule will be increased clarity for inspectors and consumers alike regarding the requirements of a written inspection report.

Comments on the proposal may be submitted to Devon V. Bijansky, Assistant General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The new rule is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapters 1101 and 1102. No other statute, code or article is affected by the proposed new rule.

§535.222. Inspection Reports.

(a) For each inspection, the inspector shall:

(1) prepare a written inspection report noting observed deficiencies and other items required to be reported; and

(2) deliver the report within a reasonable period of time to the person for whom the inspection was performed.

(b) The inspection report shall include:

(1) the name and license number of the responsible inspector;

(2) the name and license number of the apprentice or real estate inspector, and the signature of the inspector's sponsoring professional inspector, if applicable;

(3) the address or other unique description of the property on each page of the report; and

(4) the client's name.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 5, 2008.

TRD-200802352
Devon V. Bijansky
Assistant General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 465-3900

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22 TAC §535.223

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Real Estate Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Real Estate Commission (TREC) proposes the repeal of §535.223, concerning standard inspection report forms. The repeal is proposed because the subjects addressed in this section will be covered in new §535.222 and §535.223 TREC is simultaneously proposing as part of the Real Estate Inspector Committee comprehensive review and recommendations regarding inspector standards of practice and reporting requirements. The proposed new rules, otherwise explained in this issue of the *Texas Register*, would adopt by reference a revised standard inspection report form, clarify that a written inspection report is required for all inspections performed pursuant to an inspector license issued by TREC, and clarify when the standard form is required and how it may be modified by licensees.

Devon V. Bijansky, Assistant General Counsel, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the repeal. There is no anticipated impact on small businesses, micro- businesses or local or state employment as a result of implementing the repeal. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

Ms. Bijansky has also determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be clarification of for inspectors and consumers alike regarding the use of the standard inspection report form.

Comments on the proposal may be submitted to Devon V. Bijansky, Assistant General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The repeal is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapters 1101 and 1102. No other statute, code or article is affected by the proposed repeal.

§535.223. Standard Inspection Report Forms.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Real Estate Commission
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For further information, please call: (512) 465-3900

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22 TAC §535.223

The Texas Real Estate Commission (TREC) proposes new §535.223, concerning standard inspection report forms. The new rule would adopt by reference a revised standard inspection report form. TREC has a statutory duty to adopt standard inspection report forms and to adopt rules requiring licensed inspectors to use the report forms under Senate Bill Number 1100, 75th Legislature (1997). The new rule also clarifies when the form is required and how it may be modified by licensees.

The proposed new rule has been recommended by the Texas Real Estate Inspector Committee, an advisory committee of six professional inspectors and three public members appointed by TREC, to correspond to proposed revisions to the inspector standards of practice that are included in proposed new §§535.227 - 535.233 which also appear in this issue of the *Texas Register.*

Devon V. Bijansky, Assistant General Counsel, has determined that for the first five-year period the new rule is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the new rule. There is no anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the new rule. There may be a small cost to some licensees who may have to purchase upgrades to inspection report software, but this minimal cost is outweighed by the benefit to the public.

Ms. Bijansky also has determined that for each year of the first five years the new rule as proposed is in effect the public benefit anticipated as a result of enforcing the new rule will be increased clarity for inspectors and consumers alike regarding the use of the standard inspection report form.

Comments on the proposal may be submitted to Devon V. Bijansky, Assistant General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The new rule is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapters 1101 and 1102. No other statute, code or article is affected by the proposed new rule.

§535.223. Standard Inspection Report Form.

The Texas Real Estate Commission adopts by reference Property Inspection Report Form REI 7A-1, approved by the Commission in 2008 for use in reporting inspection results. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

(1) Except as provided by this section, inspections performed for a prospective buyer or prospective seller of one-to-four family residential property shall be reported on Form REI 7A-1 adopted by the Commission ("the standard form").

(2) Inspectors may reproduce the standard form by computer or from printed copies obtained from the Commission. Except as specifically permitted by this section, the inspector shall reproduce the text of the standard form verbatim and the spacing, length of blanks, borders, and placement of text on the page must appear to be identical to that in the printed version of the standard form.

(3) An inspector may make the following changes to the standard form:

(A) the inspector may delete the line for name, license number, and signature of the sponsoring inspector if the inspection was performed solely by a professional inspector;

(B) the inspector may change the typeface, provided that fonts are no smaller than those used in the printed version of the standard form;

(C) the inspector may use legal sized (8-1/2" by 14") paper;

(D) the inspector may add a cover page to the report form;

(E) the inspector may add footers to each page of the report except the first page and may add headers to each page of the report;

(F) the inspector may place the property identification and page number at either the top or bottom of the page;

(G) the inspector may add subheadings under items, provided that the numbering of the standard items remains consistent with the standard form;

(H) the inspector may list other items in the appropriate section of the form and additional captions, letters, and check boxes for those items;

(I) the inspector may delete inapplicable subsections of Section VI. Optional Systems, and re-letter any remaining subsections;

(J) the inspector may delete Subsection L. Other, of Section I. Structural Systems;

(K) the inspector may allocate such space in the "Additional Information Provided by the Inspector" section and in each of the spaces provided for comments for each inspected item as the inspector deems necessary or may attach additional pages of comments to the report; and

(L) if necessary to report the inspection of a part, component, or system not contained in the standard form, or space provided on the form is inadequate for a complete reporting of the inspection, the inspector may attach additional pages to the form. When providing comments or additional pages to report on items listed on a form, the inspector shall arrange the comments or additional pages to follow the sequence of the items listed in the form adopted by the commission.

(4) The inspector shall renumber the pages of the form to correspond with any changes made necessary due to adjusting the space for comments or adding additional items and shall number all pages of the report, including any addenda.

(5) The inspector shall indicate, by checking the appropriate boxes on the form, whether each item was inspected, not inspected, not present, and/or deficient and shall explain the findings in the appropriate space on the form.

(6) This section does not apply to the following:

(A) re-inspections of a property performed for the same client;

(B) inspections performed for or required by a lender or governmental agency;

(C) inspections for which federal or state law requires use of a different report; or

(D) quality control construction inspections of new homes performed for builders, including phased construction inspections, inspections performed solely to determine compliance with building codes, warranty or underwriting requirements, or inspections required by a municipality and the builder or other entity requires use of a different report, and the first page of the report contains a notice either in bold or underlined reading substantially similar to the following: "This report was prepared for a builder or other entity in accordance with the builder's requirements. The report is not intended as a substitute for an inspection of the property by an inspector of the buyer's choice. Standard inspections performed by a Texas Real Estate Commission licensee and reported on Texas Real Estate Commission promulgated report forms may contain additional information a buyer should consider in making a decision to purchase." If a report form required for use by the builder or builder's employee does not contain the notice, the inspector may attach the notice to the first page of the report at the time the report is prepared by the inspector.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Assistant General Counsel
Texas Real Estate Commission
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22 TAC §§535.227 - 535.231

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Real Estate Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Real Estate Commission (TREC) proposes the repeal of §§535.227 - 535.231, concerning inspector standards of practice. The repeal of the sections is proposed because the subjects addressed in these sections will be covered in new §§535.227 - 535.233. TREC is simultaneously proposing as part of the Real Estate Inspector Committee comprehensive review and recommendations regarding inspector standards of practice. The proposed new rules, otherwise explained in this issue of the *Texas Register*, divide the standards of practice for inspectors into seven sections (two additional sections) and contain a number of substantive changes recommended by the Texas Real Estate Inspector Committee, an advisory committee of six professional inspectors and three public members appointed by TREC.

As the proposed new sections will comprehensively address the subjects of the proposed repealed rules as well implement the recommendations, repeal of the existing rules is necessary to avoid confusion and repetition.

Devon V. Bijansky, Assistant General Counsel, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no anticipated impact on small businesses, micro-businesses, or local or state employment as a result of implementing the sections.

Ms. Bijansky has also determined that for each year of the first five years the proposed repeal is in effect the public benefit anticipated as a result of enforcing the new rules will be clarification of professional standards for home inspections. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

Comments on the proposed repeal may be submitted to Devon V. Bijansky, Assistant General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The repeal is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapters 1101 and 1102. No other statute, code or article is affected by the proposed repeal.

§535.227. Standards of Practice: General Provisions.
§535.228. Standards of Practice: Inspection Guidelines for Structural Systems.
§535.229. Standards of Practice: Inspection Guidelines for Mechanical Systems: Appliances, Cooling Systems, Heating Systems, Ducts, Vents and Flues, and Plumbing Systems.
§535.230. Standards of Practice: Inspection Guidelines for Electrical Systems.
§535.231. Standards of Practice: Optional Systems.
This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Devon V. Bijanksy
Assistant General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465-3900

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22 TAC §§535.227 - 535.233

The Texas Real Estate Commission (TREC) proposes new §§535.227 - 535.233, concerning inspector standards of practice. The new rules are proposed in conjunction with the Real Estate Inspector Committee's comprehensive review and recommendation regarding inspector standards of practice. The proposed new rules divide the standards of practice for inspectors into seven sections by providing two additional sections and contain a number of substantive changes recommended by the Texas Real Estate Inspector Committee, an advisory committee of six professional inspectors and three public members appointed by TREC.

Generally, the proposed new rules rearrange the current standards of practice, listing the systems, components, and items in a home which the inspector must include in an inspection unless the inspector's client agrees to limit the scope of the inspection.

New §535.227 addresses standards of practice: general provisions which include definitions, the scope, and the departure provisions of an inspection.

New §535.228 addresses minimum inspection requirements for structural systems.

New §535.229 addresses minimum inspection requirements for electrical systems.

New §535.230 address minimum inspection requirements for heating, ventilation, and air conditioning systems.

New §535.231 addresses minimum inspection requirements for plumbing systems.

New §535.232 addresses minimum inspection requirements for appliances.

New §535.233 addresses minimum inspection requirements for optional systems.

Devon V. Bijansky, Assistant General Counsel, has determined that for the first five-year period the new rules are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the new rules. There is no anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the new rules.

Ms. Bijansky also has determined that for each year of the first five years the new rules as proposed are in effect the public benefit anticipated as a result of enforcing the new rules will be increased clarity for inspectors and consumers alike, as well as standards that more accurately reflect current technology, codes, and practices that form the basis of many of the standards. There is no anticipated economic cost to persons who are required to comply with the proposed new rules.

Comments on the proposal may be submitted to Devon V. Bijansky, Assistant General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The new rules are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapters 1101 and 1102. No other statute, code or article is affected by the proposed new rules.

§535.227. Standards of Practice: General Provisions.

(a) Definitions.

(1) Accessible--In the reasonable judgment of the inspector, capable of being approached, entered, or viewed without:

(A) undue hazard to the inspector;

(B) moving furnishings or large, heavy, or fragile objects;

(C) using specialized tools or procedures;

(D) disassembling items other than covers or panels intended to be removed for inspection or maintenance;

(E) damaging property; or

(F) using a ladder for portions of the inspection other than the roof or attic space.

(2) Chapter 1102--Texas Occupations Code, Chapter 1102.

(3) Cosmetic--Related only to appearance or aesthetics, and not related to structural performance or water penetration.

(4) Deficiency--A condition that, in the inspector's reasonable judgment, adversely and materially affects the performance of a system or component or constitutes a hazard to life, limb, or property as specified by these standards of practice. General deficiencies include but are not limited to inoperability, material distress, interior water penetration, damage, deterioration, missing parts, and unsuitable installation.

(5) Deficient--Reported as having one or more deficiencies.

(6) Inspect--To look at and examine accessible items, parts, systems, or components and report observed deficiencies.

(7) Performance--Achievement of an operation, function, or configuration consistent with accepted industry practice.

(8) Report--To provide the inspector's opinions, judgment, and findings on the standard inspection report form.

(9) Specialized procedures--Procedures such as environmental testing, elevation measurement, and any method employing destructive testing that damages otherwise sound materials or finishes.

(10) Specialized tools--Tools such as thermal imaging equipment, canned smoke, moisture meters, gas leak detection equipment, environmental testing equipment and devices, elevation determination devices, and ladders capable of reaching surfaces over one story above ground surfaces.

(11) Standards of practice--Sections 535.227 - 535.233 of this title.

(b) Scope.

(1) These standards of practice define the minimum levels of inspection required for substantially completed residential improvements to real property up to four dwelling units. A real estate inspection is a limited visual survey and basic operation of the systems and components of a building using normal controls and does not require the use of specialized tools or procedures. The purpose of the inspection is to provide the client with information regarding the general condition of the residence at the time of inspection. The inspector may provide a higher level of inspection performance than required by these standards of practice and may inspect parts, components, and systems in addition to those described by the standards of practice.

(2) General Requirements. The inspector shall:

(A) operate fixed or installed equipment and appliances listed herein in at least one mode with ordinary controls at typical settings;

(B) visually inspect accessible systems or components from near proximity to the systems and components, and from the interior of the attic and crawl spaces; and

(C) complete the standard inspection report form as required by §535.222 of this title (relating to Inspection Reports) and §535.223 of this title (relating to Standard Inspection Report Form).

(3) General limitations. The inspector is not required to:

(A) inspect:

(i) items other than those listed herein;

(ii) elevators;

(iii) detached structures, decks, docks, fences, or waterfront structures or equipment;

(iv) anything buried, hidden, latent, or concealed; or

(v) automated or programmable control systems, automatic shut-off, photoelectric sensors, timers, clocks, metering devices, signal lights, lightning arrestor system, remote controls, security or data distribution systems, or solar panels;

(B) report:

(i) past repairs that appear to be effective and workmanlike;

(ii) cosmetic or aesthetic conditions; or

(iii) wear and tear from ordinary use;

(C) determine:

(i) insurability, warrantability, suitability, adequacy, capacity, reliability, marketability, operating costs, recalls, life expectancy, age, energy efficiency, vapor barriers, thermostatic operation, code compliance, utility sources, or manufacturer or regulatory requirements;

(ii) the presence or absence of pests, termites, or other wood-destroying insects or organisms;

(iii) the presence, absence, or risk of asbestos, lead-based paint, mold, mildew, or any other environmental hazard, environmental pathogen, carcinogen, toxin, mycotoxin, pollutant, fungal presence or activity, or poison; or

(iv) types of wood or preservative treatment and fastener compatibility;

(D) anticipate future events or conditions, including but not limited to:

(i) decay, deterioration, or damage that may occur after the inspection;

(ii) deficiencies from over or under use;

(iii) changes in performance of any part, component, or system due to changes in use or occupancy;

(iv) the consequences of the inspection or its effects on current or future buyers and sellers;

(v) common household accidents, personal injury, or death;

(vi) the absence of water penetration(s); or

(vii) future performance of any item;

(E) operate shut-off, safety, stop, pressure, or pressure-regulating valves or items requiring the use of codes, keys, combinations, or similar devices;

(F) designate conditions as safe;

(G) recommend or provide engineering, architectural, appraisal, mitigation, physical surveying, realty, or other specialist services;

(H) review historical records, installation instructions, repair plans, cost estimates, disclosure documents, or other reports;

(I) verify sizing, efficiency, or adequacy of the ground surface drainage system;

(J) operate recirculation or sump pumps;

(K) remedy conditions preventing inspection of any item;

(L) apply open flame to operate any appliance;

(M) turn on decommissioned equipment, systems, or utility services; or

(N) provide repair cost estimates, recommendations, or re-inspection services.

(4) In the event of a conflict between specific provisions and general provisions in the standards of practice, specific provisions shall take precedence.

(5) Departure.

(A) An inspector may depart from the standards of practice only if the requirements of subparagraph (B) of this paragraph are met, and:

(i) the inspector and client agree the item is not to be inspected;

(ii) the inspector is not qualified to inspect the item;

(iii) conditions beyond the control of the inspector reasonably prevent inspection of an item;

(iv) the item is a common element of a multi-family development and is not in physical contact with the unit being inspected, such as the foundation under another building or a part of the foundation under another unit in the same building;

(v) the inspector reasonably determines that conditions or materials are hazardous to the health or safety of the inspector; or

(vi) the inspector reasonably determines that actions of the inspector may cause damage to the property.

(B) If a part, component, or system required for inspection is not inspected, the inspector shall:

(i) advise the client at the earliest practical opportunity that the part, component, or system will not be inspected; and

(ii) make an appropriate notation on the inspection report form, clearly stating the reason the part, component, or system was not inspected.

(C) If the inspector routinely departs from inspection of a part, system, or component, the earliest practical opportunity for the notice required by this subsection is the first contact with the prospect and the inspector has reason to believe that the property being inspected has the part, system, or component the inspector routinely does not inspect.

(c) Enforcement. Failure to comply with the standards of practice is grounds for disciplinary action as prescribed by Chapter 1102.

§535.228. Standards of Practice: Minimum Inspection Requirements for Structural Systems.

(a) Foundations. The inspector shall:

(1) inspect slab surfaces, foundation framing components, subflooring, and related structural components;

(2) report:

(A) the type of foundation(s); and

(B) the vantage point from which the crawl space was inspected; and

(3) generally report present and visible indications used to render the opinion of adverse performance, such as:

(A) open or offset concrete cracks;

(B) binding, out-of-square, non-latching, warped, or twisted doors or frames;

(C) framing or frieze board separations;

(D) out-of-square wall openings or separations at wall openings or between the cladding and window/door frames;

(E) sloping floors, countertops, cabinet doors, or window/door casings;

(F) wall, floor, or ceiling cracks;

(G) rotating, buckling, or deflecting masonry cladding;

(H) separation of walls from ceilings or floors; and

(I) soil erosion, subsidence or shrinkage adjacent to the foundation and differential movement of abutting walkways, driveways, and patios;

(4) report as Deficient:

(A) exposed or damaged reinforcement;

(B) a crawl space that does not appear to be adequately ventilated;

(C) crawl space drainage that does not appear to be adequate;

(D) deteriorated materials;

(E) damaged beams, joists, bridging, blocking, piers, posts, pilings, or subfloor;

(F) non-supporting piers, posts, pilings, columns, beams, sills, or joists; and

(G) damaged retaining walls related to foundation performance; and

(5) render a written opinion as to the performance of the foundation.

(b) Specific limitations for foundations. The inspector is not required to:

(1) enter a crawlspace or any area where headroom is less than 18 inches or the access opening is less than 24 inches wide and 18 inches high;

(2) provide an exhaustive list of indicators of possible adverse performance; or

(3) inspect retaining walls not related to foundation performance.

(c) Grading and drainage. The inspector shall report as Deficient:

(1) improper or inadequate grading around the foundation;

(2) erosion;

(3) water ponding; and

(4) deficiencies in installed gutter and downspout systems.

(d) Specific limitations for grading and drainage. The inspector is not required to:

(1) inspect flatwork or detention/retention ponds;

(2) determine area hydrology or the presence of underground water; or

(3) determine the efficiency or operation of underground drainage systems.

(e) Roof covering materials. The inspector shall:

(1) inspect the roof covering materials from the surface of the roof;

(2) report:

(A) type of roof covering(s);

(B) vantage point from where the roof was inspected;

(C) any levels or surfaces that were not accessed;

(D) evidence of previous repairs to roof covering materials, flashing details, skylights, and other roof penetrations; and

(E) evidence of water penetration; and

(3) report as Deficient:

(A) a roof covering that is not appropriate for the slope of the roof;

(B) deficiencies in:

(i) roof covering materials;

(ii) flashing details;

(iii) skylights; and

(iv) other roof penetrations; and

(C) fasteners that are not present or that are not appropriate for material and location (where it can be reasonably determined by a random sampling of shingles).

(f) Specific limitations for roof covering. The inspector is not required to:

(1) determine the remaining life expectancy of the roof covering;

(2) inspect the roof from the roof level if, in the inspector's reasonable judgment, the inspector cannot safely reach or stay on the roof or significant damage to the roof covering materials may result from walking on the roof;

(3) determine the number of layers of roof covering material;

(4) identify latent hail damage; or

(5) provide an exhaustive list of locations of water penetrations or previous repairs.

(g) Roof structure and attic. The inspector shall:

(1) report:

(A) the vantage point from which the attic space was inspected;

(B) the presence of and approximate average depth of attic insulation and thickness of vertical insulation, when visible; and

(C) evidence of water penetration; and

(2) report as Deficient:

(A) attic space that does not appear to be adequately ventilated;

(B) deficiencies in installed framing members and decking;

(C) deflections or depressions in the roof surface as related to the adverse performance of the framing and the roof deck;

(D) missing insulation;

(E) deficiencies in attic access ladder and access opening; and

(F) deficiencies in attic ventilators.

(h) Specific limitations for roof structure and attic. The inspector is not required to:

(1) enter attics or unfinished spaces where openings are less than 22 inches by 30 inches or headroom is less than 30 inches;

(2) operate powered ventilators; or

(3) provide an exhaustive list of locations of water penetrations.

(i) Interior walls, ceilings, floors, and doors. The inspector shall:

(1) report evidence of water penetration; and

(2) report as Deficient:

(A) doors and hardware that do not operate properly;

(B) deficiencies related to structural performance or water penetration; and

(C) lack of separation between the garage and the residence and its attic space.

(j) Specific limitation for interior walls, doors, ceilings, and floors. The inspector is not required to report cosmetic damage or the condition of floor, wall, or ceiling coverings; paints, stains, or other surface coatings; cabinets; or countertops.

(k) Exterior walls, doors, and windows. The inspector shall:

(1) report evidence of water penetration; and

(2) report as Deficient:

(A) the lack of functional emergency escape and rescue openings in all sleeping rooms;

(B) the lack of a solid wood door not less than 1-3/8 inches in thickness, a solid or honeycomb core steel door not less than 1-3/8 inches thick, or a 20-minute fire-rated door between the residence and an attached garage;

(C) missing or damaged screens;

(D) deficiencies related to structural performance or water penetration; and

(E) deficiencies in:

(i) claddings;

(ii) water resistant materials and coatings;

(iii) flashing details and terminations;

(iv) the condition and operation of exterior doors, garage doors, and hardware; and

(v) window operation and components.

(l) Specific limitations for exterior walls, doors, and windows. The inspector is not required to:

(1) report the condition or presence of awnings, shutters, security devices, or systems;

(2) determine the cosmetic condition of paints, stains, or other surface coatings; or

(3) operate a lock if the key is not available.

(m) Exterior and interior glazing. The inspector shall:

(1) inspect the window and door glazing; and

(2) report as Deficient:

(A) insulated windows that are obviously fogged or display other evidence of broken seals;

(B) deficiencies in glazing in windows and exterior doors;

(C) deficiencies in the glazing weather stripping and glazing compound; and

(D) the absence of safety glass in hazardous locations.

(n) Specific limitation for exterior and interior glazing. The inspector is not required to:

(1) exhaustively observe insulated windows for evidence of broken seals;

(2) exhaustively observe glazing for identifying labels; or

(3) identify specific locations of damage.

(o) Interior and exterior stairways. The inspector shall report as Deficient:

(1) spacing between intermediate balusters, spindles, or rails for steps, stairways, guards, and railings that permit passage of an object greater than 4 inches in diameter, except that on the open side of the staircase treads, spheres less than 4-3/8 inches in diameter may pass through the guard rail balusters or spindles; and

(2) deficiencies in steps, stairways, landings, guardrails, and handrails.

(p) Specific limitation for stairways. The inspector is not required to exhaustively measure every stairway component.

(q) Fireplace and chimney. The inspector shall report as Deficient:

(1) built-up creosote in visible areas of the firebox and flue;

(2) the presence of combustible materials in near proximity to the firebox opening;

(3) the absence of fireblocking at the attic penetration of the chimney flue, where accessible;

(4) an inoperative circulating fan; and

(5) deficiencies in the:

(A) damper;

(B) lintel, hearth, hearth extension, and firebox;

(C) gas log lighter valve and location;

(D) combustion air vents; and

(E) chimney structure, termination, coping, crown, caps, and spark arrestor.

(r) Specific limitations for fireplace and chimney. The inspector is not required to:

(1) verify the integrity of the flue;

(2) perform a chimney smoke test; or

(3) determine the adequacy of the draft.

(s) Porches, Balconies, Decks, and Carports. The inspector shall:

(1) inspect balconies, attached carports, and attached porches and abutting porches, decks, and balconies that are used for ingress and egress; and

(2) report as Deficient:

(A) on decks 30 inches or higher above the adjacent grade, spacings between intermediate balusters, spindles, or rails that permit passage of an object greater than four inches in diameter;

(B) deficiencies in visible footings, piers, posts, pilings, beams, joists, decking, water proofing at interfaces, flashing, surface coverings, and attachment points of porches, decks, balconies, and carports; and

(C) deficiencies in or absence of required, guardrails and handrails.

(t) Specific limitation for porches, balconies, decks, and carports. The inspector is not required to:

(1) exhaustively measure the porch, balcony, deck, or attached carport components; or

(2) enter any area where headroom is less than 18 inches or the access opening is less than 24 inches wide and 18 inches high.

§535.229. Standards of Practice: Minimum Inspection Requirements for Electrical Systems.

(a) Service entrance and panels. The inspector shall report as Deficient:

(1) a drop, weatherhead, or mast that is not securely fastened to the structure;

(2) the lack of a grounding electrode system;

(3) the lack of a grounding electrode conductor;

(4) the lack of a secure connection to the grounding electrode system;

(5) deficiencies in the insulation of the service entrance conductors, drip loop, separation of conductors at weatherheads, and clearances;

(6) electrical cabinets, gutters, meter cans, and panel boards that:

(A) are not secured to the structure;

(B) are not appropriate for their location;

(C) have deficiencies in clearances and accessibility;

(D) are missing knockouts; or

(E) are not bonded and grounded;

(7) cabinets, disconnects, cutout boxes, and panel boards that do not have dead fronts secured in place with proper fasteners;

(8) conductors not protected from the edges of electrical cabinets, gutters, or cutout boxes;

(9) trip ties not installed on 240 volt circuits;

(10) deficiencies in the type and condition of the wiring in the cutout boxes, cabinets, or gutters;

(11) deficiencies in the compatibility of overcurrent devices and conductors;

(12) deficiencies in the overcurrent device and circuit for labeled and listed 240 volt appliances;

(13) a panel that is installed in a hazardous location, such as a clothes closet, a bathroom, where there are corrosive or easily ignitable materials, or where the panel is exposed to physical damage;

(14) the absence of appropriate connections, such as copper/aluminum-approved devices;

(15) the absence of anti-oxidants on aluminum conductor terminations;

(16) the lack of a main disconnecting means;

(17) the lack of arc-fault circuit interrupting devices serving family rooms, dining rooms, living rooms, parlors, libraries, dens, bedrooms, sunrooms, recreations rooms, closets, hallways, or similar rooms or areas; and

(18) failure of operation of installed arc-fault circuit interrupter devices.

(b) Specific limitations for service entrance and panels. The inspector is not required to:

(1) determine present or future sufficiency of service capacity amperage, voltage, or the capacity of the electrical system;

(2) test arc-fault circuit interrupter devices when the property is occupied or damage to personal property may result, in the inspector's reasonable judgment;

(3) report the lack of arc-fault circuit interrupter protection when the circuits are in conduit;

(4) conduct voltage drop calculations;

(5) determine the accuracy of overcurrent device labeling;

(6) remove covers where hazardous as judged by the inspector;

(7) verify the effectiveness of overcurrent devices; or

(8) operate overcurrent devices.

(c) Branch circuits, connected devices, and fixtures. The inspector shall:

(1) report the type of branch circuit conductors;

(2) manually test the accessible smoke alarms; and

(3) report as Deficient:

(A) the lack of ground-fault circuit interrupter protection in all:

(i) bathroom receptacles;

(ii) garage receptacles;

(iii) outdoor receptacles;

(iv) crawl space receptacles;

(v) unfinished basement receptacles;

(vi) kitchen countertop receptacles; and

(vii) laundry, utility, and wet bar sink receptacles located within 6 feet of the outside edge of a laundry, utility, or wet bar sink; and

(B) the failure of operation of ground-fault circuit interrupter protection devices;

(C) receptacles that:

(i) are damaged;

(ii) are inoperative;

(iii) have incorrect polarity;

(iv) are not grounded, if applicable;

(v) display evidence of arcing or excessive heat;

(vi) are not securely mounted; or

(vii) have missing or damaged covers;

(D) switches that:

(i) are damaged;

(ii) are inoperative;

(iii) display evidence of arcing or excessive heat;

(iv) are not securely mounted; or

(v) have missing or damaged covers;

(E) deficiencies in or absences of conduit, where applicable;

(F) appliances that are not bonded or grounded;

(G) deficiencies in wiring, wiring terminations, junctions, junction boxes, and fixtures;

(H) the lack of equipment disconnects;

(I) the absence of appropriate connections, such as copper/aluminum approved devices, if branch circuit aluminum conductors are discovered in the main or sub-panel based on a random sampling of accessible receptacles and switches;

(J) improper use of extension cords;

(K) deficiencies in smoke alarms that are not connected to a central alarm system; and

(L) the lack of smoke alarms:

(i) in each sleeping room;

(ii) outside each separate sleeping area in the immediate vicinity of the sleeping rooms; and

(iii) on each additional story of the dwelling, including basements but excluding crawl spaces and uninhabitable attics (in dwellings with split levels and without an intervening door between the levels, a smoke alarm installed on the upper level and the adjacent lower level shall suffice provided that the lower level is less than one full story below the upper level).

(d) Specific limitations for branch circuits, connected devices, and fixtures. The inspector is not required to:

(1) inspect low voltage wiring;

(2) exhaustively examine all outlets;

(3) disassemble mechanical appliances;

(4) verify the effectiveness of smoke alarms;

(5) activate smoke alarms using specialized tools and procedures or codes; or

(6) verify that smoke alarms are suitable for the hearing-impaired.

§535.230. Standards of Practice: Minimum Inspection Requirements for Heating, Ventilation, and Air Conditioning Systems.

(a) Heating equipment. The inspector shall:

(1) report:

(A) the type of heating system(s); and

(B) the energy source(s);

(2) report as Deficient:

(A) an inoperative unit;

(B) deficiencies in the controls and operating components of the system;

(C) the lack of protection from physical damage;

(D) burners, burner ignition devices or heating elements, switches, and thermostats that are not a minimum of 18 inches above the lowest garage floor elevation, unless the unit is listed for garage floor installation;

(E) inappropriate location;

(F) inadequate clearances;

(G) deficiencies in mounting and operation of window units; and

(H) deficiencies in thermostats;

(3) in electric units, report as Deficient deficiencies in:

(A) operation of heating elements; and

(B) condition of conductors; and

(4) in gas units, report as Deficient:

(A) gas leaks;

(B) the presence of forced air in the burner compartment;

(C) flame impingement, uplifting flame, improper flame color, or excessive scale buildup;

(D) the lack of a gas shut-off valve; and

(E) deficiencies in:

(i) conditioned, combustion, and dilution air;

(ii) gas shut-off valves and locations;

(iii) gas connector materials and connections; and

(iv) the vent pipe, draft hood, draft, proximity to combustibles, and vent termination point and clearances.

(b) Cooling equipment other than evaporative coolers. The inspector shall:

(1) report the type of system(s); and

(2) report as Deficient:

(A) inoperative unit(s);

(B) inadequate cooling as demonstrated by its performance in the reasonable judgment of the inspector;

(C) noticeable vibration of the blower fan or condensing fan;

(D) deficiencies in the condensate drain and auxiliary/secondary pan and drain system;

(E) water in the auxiliary/secondary drain pan;

(F) a primary drain pipe that terminates in a sewer vent;

(G) missing or deficient refrigerant pipe insulation;

(H) dirty evaporator or condensing coils, where accessible;

(I) damaged casings on the coils;

(J) a condensing unit lacking adequate clearances or air circulation or that has deficiencies in the condition of fins, location, levelness, or elevation above ground surfaces;

(K) deficiencies in mounting and operation of window units; and

(L) deficiencies in thermostats.

(c) Evaporative coolers. The inspector shall:

(1) report:

(A) type of system(s) (one- or two-speed);

(B) the type of water supply line; and

(C) winterized units that are drained and shut down; and

(2) report as Deficient:

(A) inoperative units;

(B) corrosive and mineral build-up or rust damage/decay at the pump, louvered panels, water trays, exterior housing, or the roof frame;

(C) less than a one-inch air gap between the water discharge at the float and water level in the reservoir;

(D) corrosion, decay, or rust on the pulleys of the motor or blower;

(E) the lack of a damper; and

(F) deficiencies in the:

(i) function of the pump;

(ii) interior housing, the spider tubes, tube clips, bleeder system;

(iii) blower and bearings;

(iv) float bracket;

(v) fan belt;

(vi) evaporative pad(s);

(vii) installation and condition of the legs on the roof rails and fasteners to the roof structure and the unit;

(viii) roof jack; and

(ix) thermostats.

(d) Duct system, chases, and vents. The inspector shall report as Deficient:

(1) damaged ducting or insulation, improper material, or improper routing of ducts;

(2) the absence of air flow at accessible supply registers in the habitable areas of the structure;

(3) improper or inadequate clearance from the earth; and

(4) deficiencies in:

(A) duct fans;

(B) filters;

(C) grills or registers;

(D) the location of return air openings; and

(E) gas piping, sewer vents, electrical wiring, or junction boxes in the duct system, plenum(s), and chase(s).

(e) Specific limitations for the heating equipment, cooling equipment, duct system, chases, and vents. The inspector is not required to:

(1) program digital thermostats or controls;

(2) inspect:

(A) for pressure of the system refrigerant, type of refrigerant, or refrigerant leaks;

(B) winterized evaporative coolers; or

(C) humidifiers, dehumidifiers, air purifiers, motorized dampers, electronic air filters, multi-stage controllers, sequencers, heat reclaimers, wood burning stoves, boilers, oil-fired units, supplemental heating appliances, de-icing provisions, or reversing valves;

(3) operate:

(A) setback features on thermostats or controls;

(B) cooling equipment when the outdoor temperature is less than 60 degrees Fahrenheit;

(C) radiant heaters, steam heat systems, or unvented gas-fired heating appliances; or

(D) heat pumps when temperatures may damage equipment;

(4) verify:

(A) compatibility of components;

(B) the accuracy of thermostats; or

(C) the integrity of the heat exchanger; or

(5) determine:

(A) sizing, efficiency, or adequacy of the system;

(B) uniformity of the supply of conditioned air to the various parts of the structure; or

(C) types of materials contained in insulation.

§535.231. Standards of Practice: Minimum Inspection Requirements for Plumbing Systems.

(a) Plumbing systems. The inspector shall report as Deficient:

(1) the presence of active leaks;

(2) the lack of fixture shut-off valves;

(3) the lack of dielectric unions, when applicable;

(4) the lack of back-flow devices, anti-siphon devices, or air gaps at the flow end of fixtures; and

(5) deficiencies in:

(A) water supply pipes and waste pipes;

(B) the installation and termination of the vent system;

(C) the operation of fixtures and faucets not connected to an appliance;

(D) water supply, as determined by viewing functional flow in two fixtures operated simultaneously;

(E) functional drainage at fixtures;

(F) orientation of hot and cold faucets;

(G) installed mechanical drain stops;

(H) installation, condition, and operation of commodes;

(I) fixtures, showers, tubs, and enclosures; and

(J) the condition of the gas distribution system.

(b) Specific limitations for plumbing systems. The inspector is not required to:

(1) operate any main, branch, or shut-off valves;

(2) operate or inspect sump pumps or waste ejector pumps;

(3) inspect:

(A) any system that has been winterized, shut down or otherwise secured;

(B) circulating pumps, free-standing appliances, solar water heating systems, water-conditioning equipment, filter systems, water mains, private water supply systems, water wells, pressure tanks, sprinkler systems, swimming pools, or fire sprinkler systems;

(C) the inaccessible gas supply system for leaks;

(D) for sewer clean-outs; or

(E) for the presence or operation of private sewage disposal systems;

(4) determine:

(A) quality, potability, or volume of the water supply; or

(B) effectiveness of backflow or anti-siphon devices; or

(5) verify the functionality of clothes washing drains or floor drains.

(c) Water heaters. The inspector shall:

(1) report the energy source;

(2) report the capacity of the unit(s);

(3) report as Deficient:

(A) inoperative unit(s);

(B) leaking or corroded fittings or tank(s);

(C) broken or missing parts or controls;

(D) the lack of a cold water shut-off valve;

(E) if applicable, the lack of a pan and drain system and the improper termination of the pan drain line;

(F) an unsafe location;

(G) burners, burner ignition devices or heating elements, switches, or thermostats that are not a minimum of 18 inches above the lowest garage floor elevation, unless the unit is listed for garage floor installation;

(H) inappropriate location;

(I) inadequate clearances;

(J) the lack of protection from physical damage;

(K) a temperature and pressure relief valve that:

(i) does not operate manually;

(ii) leaks;

(iii) is damaged;

(iv) cannot be tested due to obstructions;

(v) is corroded; or

(vi) is improperly located; and

(L) temperature and pressure relief valve discharge piping that:

(i) lacks gravity drainage;

(ii) is improperly sized;

(iii) has inadequate material; or

(iv) lacks proper termination;

(4) in electric units, report as Deficient deficiencies in:

(A) operation of heating elements; and

(B) condition of conductors; and

(5) in gas units, report as Deficient:

(A) gas leaks;

(B) lack of burner shield(s);

(C) flame impingement, uplifting flame, improper flame color, or excessive scale build-up;

(D) the lack of a gas shut-off valve; and

(E) deficiencies in:

(i) combustion and dilution air;

(ii) gas shut-off valve(s) and location(s);

(iii) gas connector materials and connections; and

(iv) vent pipe, draft hood, draft, proximity to combustibles, and vent termination point and clearances.

(d) Specific limitations for water heaters. The inspector is not required to:

(1) verify the effectiveness of the temperature and pressure relief valve, discharge piping, or pan drain pipes;

(2) operate the temperature and pressure relief valve if the operation of the valve may, in the inspector's reasonable judgment, cause damage to persons or property; or

(3) determine the efficiency or adequacy of the unit.

(e) Hydro-massage therapy equipment. The inspector shall report as Deficient:

(1) inoperative unit(s) and controls;

(2) the presence of active leaks;

(3) inaccessible pump(s) or motor(s);

(4) the lack or failure of required ground-fault circuit interrupter protection; and

(5) deficiencies in the ports, valves, grates, and covers.

(f) Specific limitation for hydro-massage therapy equipment. The inspector is not required to determine the adequacy of self-draining features of circulation systems.

§535.232. Standards of Practice: Minimum Inspection Requirements for Appliances.

(a) Dishwasher. The inspector shall report as Deficient:

(1) inoperative unit(s);

(2) rust on the interior of the cabinet or components;

(3) failure to drain properly;

(4) the presence of active water leaks; and

(5) deficiencies in the:

(A) door gasket;

(B) control and control panels;

(C) dish racks;

(D) rollers;

(E) spray arms;

(F) operation of the soap dispenser;

(G) door springs;

(H) dryer element;

(I) door latch and door disconnect;

(J) rinse cap;

(K) secure mounting of the unit; and

(L) backflow prevention.

(b) Food waste disposer. The inspector shall report as Deficient:

(1) inoperative unit(s);

(2) unusual sounds or vibration level;

(3) the presence of active water leaks; and

(4) deficiencies in the:

(A) splash guard;

(B) grinding components;

(C) exterior casing; and

(D) secure mounting of the unit.

(c) Range exhaust vent. The inspector shall report as Deficient:

(1) inoperative unit(s);

(2) a vent pipe that does not terminate outside the structure, if the unit is not of a re-circulating type or configuration;

(3) inadequate vent pipe material;

(4) unusual sounds or vibration levels from the blower fan(s);

(5) blower(s) that do not operate at all speeds; and

(6) deficiencies in the:

(A) filter;

(B) vent pipe;

(C) light and lens;

(D) secure mounting of the unit; and

(E) switches.

(d) Electric or gas ranges, cooktops, and ovens. The inspector shall report as Deficient:

(1) inoperative unit(s);

(2) the lack of a gas shut-off valve;

(3) gas leaks; and

(4) deficiencies in the:

(A) controls and control panels;

(B) thermostat(s) sensor support;

(C) glass panels;

(D) door gasket(s), hinges, springs, closure, and handles;

(E) door latch;

(F) heating elements or burners;

(G) thermostat accuracy (within 25 degrees at a setting of 350 F);

(H) drip pans;

(I) lights and lenses;

(J) clearance to combustible material;

(K) anti-tip device;

(L) gas shut-off valve(s) and location(s);

(M) gas connector materials and connections; and

(N) secure mounting of the unit.

(e) Microwave oven. The inspector shall:

(1) inspect built-in units; and

(2) report as Deficient:

(A) inoperative unit(s); and

(B) deficiencies in the:

(i) controls and control panels;

(ii) handles;

(iii) the turn table;

(iv) interior surfaces;

(v) door and door seal;

(vi) glass panels;

(vii) lights and lenses;

(viii) secure mounting of the unit; and

(ix) operation, as determined by heating a container of water or with other means of testing.

(f) Trash compactor. The inspector shall report as Deficient:

(1) inoperative unit(s);

(2) unusual sounds or vibration levels; and

(3) deficiencies in the secure mounting of the unit.

(g) Mechanical exhaust vents and bathroom heaters. The inspector shall report as Deficient:

(1) inoperative unit(s);

(2) unusual sounds, speed, and vibration levels;

(3) vent pipes that do not terminate outside the structure;

(4) a gas heater that is not vented to the exterior of the structure; and

(5) the lack of an exhaust ventilator in required areas.

(h) Garage door operators. The inspector shall report as Deficient:

(1) inoperative unit(s);

(2) door locks or side ropes that have not been removed or disabled; and

(3) deficiencies in:

(A) installation;

(B) condition and operation of the garage door operator;

(C) automatic reversal during the closing cycle;

(D) electronic sensors;

(E) the control button; and

(F) the emergency release components.

(i) Doorbell and chimes. The inspector shall report as Deficient:

(1) inoperable unit(s); and

(2) deficiencies in components.

(j) Dryer vents. The inspector shall report as Deficient:

(1) improper routing and length of vent pipe;

(2) inadequate vent pipe material;

(3) improper termination;

(4) the lack of a dryer vent system when provisions are present for a dryer; and

(5) damaged or missing exterior cover.

(k) Specific limitations for appliances. The inspector is not required to:

(1) operate or determine the condition of other auxiliary components of inspected items;

(2) test for microwave oven radiation leaks;

(3) inspect self-cleaning functions;

(4) test trash compactor ram pressure; or

(5) determine the adequacy of venting systems.

§535.233. Standards of Practice: Minimum Inspection Requirements for Optional Systems.

If an inspector agrees to inspect a component described in this section, §535.227 of this title (relating to Standards of Practice: General Provisions) and the applicable provisions in paragraphs (1) - (15) of this section apply.

(1) Lawn and garden sprinkler systems. The inspector shall:

(A) manually operate all zones or stations on the system; and

(B) report as Deficient:

(i) surface water leaks;

(ii) the absence or improper installation of anti-siphon devices and backflow preventers;

(iii) the absence of shut-off valves;

(iv) deficiencies in water flow or pressure at the zone heads;

(v) the lack of a rain or freeze sensor;

(vi) deficiencies in the condition of the control box; and

(vii) deficiencies in the operation of each zone, associated valves, and spray head patterns.

(2) Specific limitations for lawn and garden sprinkler systems. The inspector is not required to inspect:

(A) for effective coverage of the sprinkler system;

(B) the automatic function of the timer or control box;

(C) the effectiveness of the rain or freeze sensor; or

(D) sizing and effectiveness of anti-siphon devices or backflow preventers.

(3) Swimming pools, spas, hot tubs, and equipment. The inspector shall:

(A) report the type of construction;

(B) report as Deficient:

(i) a pump motor, blower, or other electrical equipment that lacks bonding;

(ii) the absence of or deficiencies in safety barriers;

(iii) water leaks in above-ground pipes and equipment;

(iv) deficiencies in lighting fixture(s);

(v) the lack or failure of required ground-fault circuit interrupter protection; and

(vi) deficiencies in:

(I) surfaces;

(II) tiles, coping, and decks;

(III) slides, steps, diving boards, handrails, and other equipment;

(IV) drains, skimmers, and valves; and

(V) filters, gauges, pumps, motors, controls, and sweeps; and

(C) when inspecting a pool heater, report deficiencies that these standards of practice require to be reported for the heating system.

(4) Specific limitations for swimming pools, spas, hot tubs, and equipment. The inspector is not required to:

(A) dismantle or otherwise open any components or lines;

(B) operate valves;

(C) uncover or excavate any lines or concealed components of the system or determine the presence of sub-surface leaks;

(D) fill the pool, spa, or hot tub with water;

(E) inspect any system that has been winterized, shut down, or otherwise secured;

(F) determine the presence of sub-surface water tables; or

(G) inspect ancillary equipment such as computer controls, covers, chlorinators or other chemical dispensers, or water ionization devices or conditioners other than required by this section.

(5) Outbuildings. The inspector shall report as Deficient:

(A) the lack of ground-fault circuit interrupter protection in grade-level portions of unfinished accessory buildings used for storage or work areas, boathouses, and boat hoists; and

(B) deficiencies in the structural, electrical, plumbing, heating, ventilation, and cooling systems that these standards of practice require to be reported for the principal structure.

(6) Outdoor cooking equipment. The inspector shall:

(A) inspect the built-in equipment; and

(B) report the energy source; and

(C) report as Deficient:

(i) inoperative unit(s);

(ii) a unit or pedestal that is not stable;

(iii) gas leaks; and

(iv) deficiencies in:

(I) operation;

(II) control knobs, handles, burner bars, grills, the box, the rotisserie (if present), and heat diffusion material;

(III) gas shut-off valve(s) and location(s); and

(IV) gas connector materials and connections.

(7) Gas supply systems. The inspector shall:

(A) test gas lines using a local or an industry-accepted procedure; and

(B) report as Deficient:

(i) leaks; and

(ii) deficiencies in the condition and type of gas piping, fittings, and valves.

(8) Specific limitation for gas lines. The inspector is not required to inspect sacrificial anode bonding or for its existence.

(9) Private water wells. The inspector shall:

(A) operate at least two fixtures simultaneously;

(B) recommend or arrange to have performed water quality or potability testing;

(C) report:

(i) the type of pump and storage equipment; and

(ii) the proximity of any known septic system; and

(D) report as Deficient deficiencies in:

(i) water pressure and flow and operation of pressure switches;

(ii) the condition of visible and accessible equipment and components; and

(iii) the well head, including improper site drainage.

(10) Specific limitations for private water wells. The inspector is not required to:

(A) open, uncover, or remove the pump, heads, screens, lines, or other components or parts of the system;

(B) determine the reliability of the water supply or source; or

(C) locate or verify underground water leaks.

(11) Private sewage disposal (septic) systems. The inspector shall:

(A) report:

(i) the type of system;

(ii) the location of the drain field; and

(iii) the proximity of any known water wells, underground cisterns, water supply lines, bodies of water, sharp slopes or breaks, easement lines, property lines, soil absorption systems, swimming pools, or sprinkler systems; and

(B) report as Deficient:

(i) visual or olfactory evidence of effluent seepage or flow at the surface of the ground;

(ii) inoperative aerators or dosing pumps; and

(iii) deficiencies in:

(I) accessible or visible components;

(II) functional flow;

(III) site drainage around or adjacent to the system; and

(IV) the aerobic discharge system.

(12) Specific limitations for individual private sewage disposal (septic) systems. The inspector is not required to:

(A) excavate or uncover the system or its components;

(B) determine the size, adequacy, or efficiency of the system; or

(C) determine the type of construction used.

(13) Whole-house vacuum system. The inspector shall report as Deficient:

(A) inoperative units;

(B) deficiencies in the main unit; and

(C) deficiencies in outlets.

(14) Specific limitations for whole-house vacuum systems. The inspector is not required to:

(A) inspect the attachments or hoses; or

(B) verify that accessory components are present.

(15) Other built-in appliances. The inspector shall report deficiencies in condition or operation of other built-in appliances not listed in this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Texas Real Estate Commission
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CHAPTER 537. PROFESSIONAL AGREEMENTS AND STANDARD CONTRACTS

22 TAC §§537.20, 537.28, 537.30 - 537.32, 537.37, 537.39, 537.43 - 537.45

The Texas Real Estate Commission (TREC) proposes amendments to §537.20 concerning Standard Contract Form TREC No. 9-7; §537.28 concerning Standard Contract Form TREC No. 20-8; §537.30 concerning Standard Contract Form TREC No. 23-8; §537.31 concerning Standard Contract Form TREC No. 24-8; §537.32 concerning Standard Contract Form TREC No. 25-6; §537.37 concerning Standard Contract Form TREC No. 30-7; §537.39 concerning Standard Contract Form TREC No. 32-2; §537.43 concerning Standard Contract Form TREC No. 36-5; §537.44 concerning Standard Contract Form TREC No. 37-3; and §537.45 concerning Standard Contract Form TREC No. 38-2. The amendments propose to adopt by reference six revised contract forms and four addenda for use by Texas real estate licensees.

Texas real estate licensees are generally required to use forms promulgated by TREC when negotiating contacts for the sale of real property. These forms are drafted by the Texas Real Estate Broker-Lawyer Committee, an advisory body consisting of six attorneys appointed by the President of the State Bar of Texas, six brokers appointed by TREC, and a public member appointed by the governor.

The amendment to §537.20 proposes to adopt by reference Standard Contract Form TREC No. 9-7, Unimproved Property Contract. The proposed revisions are the same as those proposed for Standard Contract Form TREC No. 20-8 and further described below except for the following: Paragraph 2 is not amended, and a new checkbox is not added to paragraph 22 regarding the Addendum Containing Required Notices Under §5.01, §420.001, and §420.002, Texas Property Code.

The amendment to §537.28 proposes to adopt by reference Standard Contract Form TREC No. 20-8, One to Four Family Residential Contract (Resale). Paragraph 1 is rewritten to define the parties to the contract. New language is added to paragraph 2D to clarify that improvements and accessories retained by Seller must be removed prior to delivery of possession. In paragraph 5, "both" is replaced by "all" as there may be more than two parties to a contract. In paragraph 6D, the sentence that addresses the time for Buyer to object is rewritten for clarity. Paragraph 6E(2) is amended to address issues relating to membership in a "property owners' association" rather than a "mandatory owners' association" to track statutory language in §5.012, Texas Property Code. Also, paragraph 6E(2) is amended to indicate that the residential community the Property is located in is identified in Paragraph 2A to conform to §5.012, Texas Property Code, and the last sentence is bolded for extra emphasis. Paragraph 7D is amended to provide checkboxes to choose whether Buyer accepts property in its present condition or in its present condition with specific repairs enumerated. Under paragraph 9, subparagraphs C and D are moved to paragraph 19, and a new clause, (4), is added to subparagraph B regarding Seller's representations. The text for the new clause is moved from paragraph 19. Under paragraph 12A(1)(b), the reference to the Veterans Housing Assistance Program is changed to a reference to the Texas Veterans Land Board because there are more than one loan programs available from the Veterans Land Board. Paragraph 17 is amended to substitute "Buyer, Seller, Listing Broker, Other Broker or escrow agent who prevails" for "The prevailing party" to clarify that the attorney fee provision applies to all of the named persons and not just the parties to the contract. Paragraph 18D is amended to clarify that damages for wrongfully failing or refusing to sign a release of earnest money include the sum of the earnest money, three times the earnest money, reasonable attorney's fees and all costs of suit. Paragraph 19 is revised to add text that was deleted from subparagraphs 9(C) and (D). Paragraph 22 is revised to add a checkbox for the Addendum Containing Required Notices Under §5.01, §420.001, and §420.002, Texas Property Code, and to revise the title of the Addendum for Property Subject to Membership in a Property Owners' Association. Paragraph 23 is amended to clarify that if the Buyer fails to pay the Option Fee to Seller within the time prescribed, the option paragraph will not be a part of the contract. Currently it is not clear that the Buyer must pay the Option Fee to Seller.

The amendment to §537.30 proposes to adopt by reference Standard Contract Form TREC No. 23-8, New Home Contract (Incomplete Construction). The proposed revisions are the same as those proposed for Standard Contract Form TREC No. 20-8 described above except for the following: The checkbox added to paragraph 22 regarding the Addendum Containing Required Notices Under §5.01, §420.001, and §420.002, Texas Property Code is pre-checked and a parenthetical is included to explain that the addendum must be attached and Paragraphs B and C must be completed.

The amendment to §537.31 proposes to adopt by reference Standard Contract Form TREC No. 24-8, New Home Contract (Completed Construction). The proposed revisions are the same as those proposed for Standard Contract Form TREC No. 20-8 described above except for the following: The checkbox added to paragraph 22 regarding the Addendum Containing

Required Notices Under §5.01, §420.001, and §420.002, Texas Property Code is pre-checked and a parenthetical is included to explain that the addendum must be attached and Paragraphs B and C must be completed.

The amendment to §537.32 proposes to adopt by reference Standard Contract Form TREC No. 25-6, Farm and Ranch Contract. The proposed revisions are the same as those proposed for Standard Contract Form TREC No. 20-8 described above.

The amendment to §537.37 proposes to adopt by reference Standard Contract Form TREC No. 30-7, Residential Condominium Contract (Resale). The proposed revisions are the same as those proposed for Standard Contract Form TREC No. 20-8 described above.

The amendment to §537.39 proposes to adopt by reference Standard Contract Form TREC No. 32-2, Condominium Resale Certificate. The proposed revisions are nonsubstantive in nature and conform paragraph N and the signature line of the form with TREC No. 37-3, Subdivision Information, Including Resale Certificate for Property Subject to Membership in a Property Owners' Association.

The amendment to §537.43 proposes to adopt by reference Standard Contract Form TREC No. 36-4, Addendum for Property Subject to Membership in a Property Owners' Association. The title of the form is changed to conform to §5.012, Texas Property Code; the term "property" is substituted for "mandatory" to more accurately reflect the terminology in §5.012, Texas Property Code; and the term "owners" is deleted from paragraph B and the last paragraph.

The amendment to §537.44 proposes to adopt by reference Standard Contract Form TREC No. 37-3, Subdivision Information, Including Resale Certificate for Property Subject to Membership in a Property Owners' Association. The title of the form is changed to conform to §5.012, Texas Property Code; the parenthetical below the title is amended to read "Chapter 207, Texas Property Code"; the term "owners" is deleted from various provisions in the form; another line is added near the end of the form for the name of the person signing the form.

The amendment to §537.45 proposes to adopt by reference Standard Contract Form TREC No. 38-2, Notice of Buyer's Termination of Contract. The termination notice is modified to serve as an all purpose Buyer's notice of termination to be used under various circumstances detailed in the form including but not limited to notifying the Seller that the contract is terminated under paragraph 23; Buyer cannot obtain Financing Approval; Property does not satisfy the lenders' underwriting requirements for the loan; Buyer elects to termination under Paragraph A of the Addendum for Property Subject to Mandatory Membership in an Owners' Association; Buyer elects to termination under paragraph 7B(2) of the contract; or that Buyer is terminating pursuant to a specific paragraph in the contract or addendum to be identified in the form.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the sections.

Ms. DeHay also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be the availability of current standard contract forms. There is no anticipated economic cost to persons who are required to comply with the proposed sections other than the costs of obtaining copies of the forms, which would be available at no charge through the TREC web site.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1101; and to establish standards of conduct and ethics for its licensees to fulfill the purposes of Chapter 1101 and ensure compliance with Chapter 1101.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed amendments.

§537.20. Standard Contract Form TREC No. 9-7[~~6~~].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 9-7[~~6~~] approved by the Texas Real Estate Commission in 2008 [~~2006~~] for use in the sale of unimproved property where intended use is for one to four family residences. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.state.tx.us.

§537.28. Standard Contract Form TREC No. 20-8[~~7~~].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 20-8[~~7~~] approved by the Texas Real Estate Commission in 2008 [~~2006~~] for use in the resale of residential real estate. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.state.tx.us.

§537.30. Standard Contract Form TREC No. 23-8[~~7~~].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 23-8[~~7~~] approved by the Texas Real Estate Commission in 2008 for use in the sale of a new home where construction is incomplete. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.31. Standard Contract Form TREC No. 24-8[~~7~~].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 24-8[~~7~~] approved by the Texas Real Estate Commission in 2008 for use in the sale of a new home where construction is completed. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.32. Standard Contract Form TREC No. 25-6[~~5~~].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 25-6[~~5~~] approved by the Texas Real Estate Commission in 2008 [~~2006~~] for use in the sale of a farm or ranch. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.state.tx.us.

§537.37. Standard Contract Form TREC No. 30-7[~~6~~].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 30-7[~~6~~] approved by the Texas Real Estate Commission in 2008 [~~2006~~] for use in the resale of a residential condominium unit. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.state.tx.us.

§537.39. Standard Contract Form TREC No. 32-2[1].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 32-2[1] approved by the Texas Real Estate Commission in 2008 [2007] for use as a condominium resale certificate. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.state.tx.us.

§537.43. Standard Contract Form TREC No. 36-5[4].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 36-5[4] approved by the Texas Real Estate Commission in 2008 [2006] for use as an addendum to be added to promulgated forms in the sale of property subject to mandatory membership in an owners' association. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.state.tx.us.

§537.44. Standard Contract Form TREC No. 37-3[2].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 37-3[2] approved by the Texas Real Estate Commission in 2008 [2006] for use as a resale certificate when the property is subject to mandatory membership in an owners' association. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.state.tx.us.

§537.45. Standard Contract Form TREC No. 38-2[1].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 38-2[1] approved by the Texas Real Estate Commission in 2008 [2002] for use as a notice of termination of contract. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.state.tx.us.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 5, 2008.

TRD-200802356
Loretta R. DeHay
Assistant Administrator and General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 465-3900

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22 TAC §537.49

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Real Estate Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Real Estate Commission (TREC) proposes the repeal of §537.49 concerning standard contract form TREC No. 42-0, in connection with the anticipated adoption of revised contract forms. The form adopted by reference in §537.49 is no longer needed as a result of consolidation of forms.

Section 535.49 concerns a form promulgated for use as a notice that buyer cannot obtain financing pursuant to the Third Party Financing Condition Addendum. A proposed amendment to the Notice of Buyer's Termination of Contract, TREC No. 38-2, otherwise proposed in this issue of the *Texas Register*, provides the same notice. Therefore, this notice form is no longer needed.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the repeal. There is no anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the repeal.

Ms. DeHay also has determined that for each year of the first five years the repeal as proposed is in effect the public benefit anticipated as a result of enforcing the repeal will be the availability of current standard contract forms. There is no anticipated economic cost to persons who are required to comply with the proposed repeal other than the costs of obtaining copies of the forms, which would be available at no charge through the TREC web site.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The repeal is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapter 1101; and to establish standards of conduct and ethics for its licensees to fulfill the purposes of Chapter 1101 and ensure compliance with Chapter 1101.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed amendments.

§537.49. Standard Contract form TREC No. 42-0.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 5, 2008.

TRD-200802355
Loretta R. DeHay
Assistant Administrator and General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 465-3900

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING

The General Land Office (GLO) proposes amendments to §15.2, relating to definitions of small and large scale construction and restoration and §15.3, relating to review periods for large and small scale construction, standard and expedited periods for review of local government beach and dune plans by the GLO, and determination of the line of vegetation by the GLO necessary for establishing the boundary of the public beach easement. The GLO proposes an amendment to §15.8, relating to beach user fees in order to provide a technical correction changing the reference from "bank accounts" to instead refer to "revenue accounts," consistent with current accounting practices.

The GLO also proposes new §15.16 and amended §15.41 in order to provide guidelines for local governments to establish

Erosion Response Plans (ERPs) which incorporate a building set-back line. The guidelines for ERPs include provisions for prohibition of building habitable structures seaward of the building set-back line, exemptions for certain construction seaward of the set-back line, stricter construction requirements for exempted construction, improvements to and protection of public beach access and dunes from storm damage, and procedures for adoption of the plans. While adoption of these plans by local governments is voluntary, implementation of plans is a consideration for award of funds for Coastal Erosion Planning and Response Act (CEPRA) Projects by the Commissioner. The proposed amendment to §15.41 concerning the evaluation process for coastal erosion studies and projects adds consideration of whether a local government has implemented a building set-back line to the factors considered by the Commissioner for a CEPRA award for a project within the local government's jurisdiction.

BACKGROUND AND SECTION-BY-SECTION ANALYSIS OF PROPOSED RULES

§15.2 Definitions

The 80th Legislature enacted House Bill (HB) 2819 (Acts 2007, 80th Leg., Ch. 1256, eff. Sept. 1, 2007) which amended §61.015(c) of the Open Beaches Act (Texas Natural Resources Code §§61.001 - 61.026) and §63.056(a) of the Dune Protection Act (Texas Natural Resources Code §§63.001 - 63.1814) to allow a 30 working day period for review of development plans for large-scale construction, described as construction activity that includes greater than 5,000 square feet or habitable structures greater than two stories in height. The longer period of review applies if either of these thresholds is exceeded. The previous 10 working day period for review of development plans was maintained for review of development plans for small scale construction, described as construction activity that includes less than or equal to 5,000 square feet or habitable structures less than or equal to two stories in height. The GLO does not consider the area below the lowest habitable level of an elevated structure a "story" for the purpose of this rule. HB 2819 also amended §63.002 of the Dune Protection Act to define restoration as "the repair or replacement of dunes or dune vegetation." An amendment to §15.2 is proposed to conform the definitions of large and small scale construction in the rules to these statutory changes and to add the definition for restoration.

§15.3 Administration

HB 2819 amended Texas Natural Resources Code §33.607 to authorize local governments subject to the Open Beaches Act and the Dune Protection Act to establish and implement a plan for reducing public expenditures for erosion and storm damage losses to public and private property through the establishment and implementation of a building set-back line. The statutory requirement in §33.607(f)(3) stipulates that the building set-back line be established no further landward than the dune protection line established under Texas Natural Resources Code, Chapter 63. Section 63.121 of the Dune Protection Act authorizes the Commissioner to establish rules for the identification and protection of critical dune areas which local governments must use to establish dune protection lines, as specified in §63.011(a) of the Dune Protection Act. The GLO proposes to amend rules in §15.3(f) to ensure that a local government establishes a dune protection line a sufficient distance landward to allow establishment and implementation of a building set-back line in order to provide protection of critical dune areas from erosion caused by development.

HB 2819 amended §63.121(b)(2) of the Dune Protection Act to require certification by the Commissioner of local government procedures and requirements governing the review and approval of dune protection permits. Prior to amendment by HB 2819, the Open Beaches Act and the Dune Protection Act limited the GLO to a review period of 10 working days for beachfront construction certificates and dune protection permits for both large-scale and small-scale construction. HB 2819 amended §61.015(c) of the Open Beaches Act and §63.056(a) of the Dune Protection Act to require the commissioner's court or governing body of a municipality to send the Commissioner notice of the hearing and a copy of the certificate or permit application for large-scale construction for review and comment not less than 30 working days before the date of the public hearing. Section 15.3 is amended to incorporate the new 30 working day comment period by the GLO for beachfront construction certificates and dune protection permits applicable to large-scale construction.

HB 2819 amended §61.011(d) and §61.015(b) of the Open Beaches Act to authorize the Commissioner to establish rules for expedited review of beach access and use plans and to change the time period for plan review from 60 days to 90 days. The GLO proposes to amend §15.3 to provide three levels of plan review: a 30-day review period for plan amendments that do not contain variances or substantially alter beach access or dune protection; a 60-day review period for plan amendments that do not include changes to beach user fees, changes to beach access points, changes to vehicular access, or substantial alteration of beach access or dune protection; and a 90-day review period if beach user fees, beach access points, or vehicular access are changed and/or beach access and dune protection is substantially altered. The local government will be required to justify applications for 30-day and 60-day review periods. The proposed changes also eliminate references to the role of the attorney general's office in local government plan review based upon changes by the 78th Legislature to §61.015 of the Open Beaches Act, contained in HB 1547 (Acts 2003, 78th Leg., ch. 245, §2, eff. June 18, 2003).

HB 2819 also amended §61.011(d)(8) and §61.020(b) of the Open Beaches Act to authorize the Commissioner to establish rules for determining the line of vegetation (LOV) or natural LOV, and to provide that the Commissioner's determination of the LOV constitutes prima facie (legally sufficient) evidence of the landward boundary of the area subject to the public easement until a court adjudication establishes the line in another place. The proposed amendments to §15.3 include procedures for insuring that identification of the LOV submitted by local governments and applicants for beachfront construction certificates is verified by the GLO in a manner consistent with statutory requirements provided in §61.016 and §61.017 of the Open Beaches Act. These procedures will also require individuals seeking an LOV determination for the purpose of evaluating the suitability of property for purchase or construction to submit LOV determination requests to the local government for review prior to submission to the GLO.

§15.8 Beach User Fees

Beach user fee (BUF) regulations in §15.8 require the maintenance of separate banking accounts for BUF funds from other revenue sources. In view of technological advances in accounting, it is no longer essential to require a separate physical bank account. Currently acceptable accounting practices allow revenue to be pooled into one physical bank account, but tracked through unique revenue accounts. The proposed changes to

§15.8 would modify the existing requirement to maintain separate physical accounts, which often come at additional costs, and strengthen the local government's obligation to track BUF revenues.

§15.16 Local Government Erosion Response Plans

Texas Natural Resources Code §33.607(g) as amended by HB 2819 authorizes the Commissioner to adopt rules for the establishment and implementation of a building set-back line. Section 33.607(e) establishes optional requirements for a plan to reduce public expenditures for erosion and storm damage loss to public and private properties, including public beaches, by establishing a building set-back line that will accommodate shoreline retreat. The local government is required to hold public educational meetings before implementing the plan to establish a building set-back line through the plans, orders, or ordinances provided by Chapter 61 (Open Beaches Act) and Chapter 63 (Dune Protection Act). Texas Natural Resources Code §33.607(f) provides further guidance on plan contents by outlining provisions for preservation and enhancement of the public's right of access to and use of the public beach, the protection of critical storm dunes for natural storm protection and conservation purposes, the establishment of a building set-back line, the prohibition of new construction seaward of the building set-back line, and the acquisition of fee title to or a lesser interest in property seaward of the building set-back line.

The GLO proposes new §15.16 which incorporates guidelines for local governments to address when implementing the provisions of Texas Natural Resources Code §33.607(e) and (f). The new rule includes technical standards recommending location of the set-back line at a distance of 60 times the annual erosion rate, as measured from the line of vegetation, or 25 feet landward of the landward toe of the foredune ridge, whichever is greater. Where there is no foredune ridge, the set-back line must be at least 300 feet from mean high water. The primary objective of a building set-back line is to prohibit construction of all structures seaward of the line except in cases where no practicable alternative exists. The new rule outlines matters that the plan should address including amenities, impervious cover, and purchase of fee simple or lesser interests in such property. In addition, the new rule recommends that the set-back provisions include a presumption that a permit applicant has met the dune mitigation sequence requirements for avoidance and minimization if it complies with building set-back provisions. The guidelines include exemptions from set-back requirements, including: allowance of construction on land adjacent to accreting beaches, allowance of some construction where no practicable alternative exists, repair of properties damaged by storms, and allowance of new permits for property that is the subject of an expired permit in previously approved platted subdivisions or expired master plans. Exempted properties may be subject to stricter building standards, including: setting the structure higher, open foundations, certification of foundations, development of relocation plans by a registered professional engineer, and protection of the foredune ridge. Finally, the rules include guidelines for submitting ERPs to the GLO for approval before being certified as an amendment to the local government beach access and dune protection plan and being considered for funding under CEPRA.

§15.41 Evaluation Process for Coastal Erosion Studies and Projects

Texas Natural Resources Code §33.605(b) as amended by HB 2819 requires the Commissioner to consider whether a local government is adequately administering a building set-back line established under Texas Natural Resources Code §33.607 in determining whether approve an expenditure from the Coastal Erosion Response Account for a coastal erosion study or project within a local government's jurisdiction. The GLO proposes an amendment to §15.41 to conform the GLO's rules for evaluation of CEPRA project goal summaries to the statute as amended by HB 2819.

FISCAL AND EMPLOYMENT IMPACTS

Ms. Jodena Henneke, Deputy Commissioner for the GLO's Coastal Resources Program Area, has determined that for each year of the first five years the amendments and new section as proposed are in effect there will be no fiscal implications for state government as a result of enforcing or administering the amendments and new section. There will be no fiscal impact on local governments for each of the first five years the amendments as proposed are in effect as a result of enforcing or administering the rules contained in §§15.2, 15.3, 15.8, and 15.41.

Ms. Henneke has determined that the proposed rule amendments in §§15.2, 15.3, 15.8, and 15.41 will not increase the costs of compliance for small or large businesses and individuals required to comply with the sections as amended.

Ms. Henneke has determined that there may be fiscal implications to local governments or additional costs of compliance for large and small businesses or individuals resulting from the proposed new rule for implementation of Erosion Response Plans (§15.16). However, these fiscal impacts cannot be estimated with certainty at this time, since development of these plans and the specific content of these plans are optional for local governments. In addition, it is the opinion of the GLO that the costs of implementation of Erosion Response Plans will be offset by a reduction in public expenditures for erosion and storm damage losses to private and public property. Communities that adopt substantial elements of these guidelines provided by the GLO may qualify individual flood insurance policies for reduced National Flood Insurance Program insurance rates.

Likewise, costs of compliance for businesses or individuals will be offset by reduction in losses due to storm damage. New structures that are constructed behind the building set-back line will have reduced losses because of a reduction in the intensity of storm surge and a delayed exposure to erosion. New structures constructed seaward of the building set-back line will have reduced losses because of stricter building standards and improvements in storm protection through upgrades to access points and foredune ridges. In addition, the presumption of compliance with dune mitigation sequence requirements for avoidance and minimization will simplify and reduce the cost to developers of crafting mitigation plans for large-scale developments.

Local governments may choose to purchase open land or properties damaged by storms to prevent future encroachment on the public beach or storm exposure. Funding requirements and sources will need to be identified by local governments in Erosion Response Plans for these purchases. Additionally local governments may lose eligibility for funds from the Coastal Erosion Planning and Response Account for failure to implement Erosion Response Plans intended to reduce public expenditures or establish an effective building set-back line.

The GLO has determined that a local employment impact statement on these proposed regulations is not required, because the proposed regulations will not adversely affect any local economy in a material manner for the first five years they will be in effect.

PUBLIC BENEFIT

Ms. Henneke has also determined that each year for the first five year period the amendments and new section are in effect the public will benefit from the proposed regulations concerning review and construction of large-scale construction because the size and potential impacts of such construction require additional time for technical review and consideration of local impacts as compared with small-scale projects. The additional time will also allow the staff of GLO and local governments to meet with project developers to minimize and avoid proposed construction impacts to beach access and dune protection.

The public will benefit from the 90-day time period authorized for the review and discussion with local governments on proposed substantial changes to beach and dune plans, because the additional time will be used to assure that large and complex changes are being done in such a manner that will benefit public beach access and dune protection. The rules for expedited review authorized by HB 2819 provide a mechanism for local governments, with sufficient justification, to submit for GLO review less complex changes to plans, along with shorter time periods for review. Accounting procedures for revenues from beach user fees will be made consistent with current accounting practices.

The administrative processes for determination of the LOV provides an alternative to costly litigation. Recognition of determination of the LOV by the GLO as prima facie evidence of the landward boundary of the area subject to the public easement improves the GLO's ability to defend the common law right of the public to use and enjoyment of the public beach.

The public will benefit from local government adoption of Erosion Response Plans because of reduced public expenditures associated with loss of structures and public infrastructure due to storm damage and erosion, disaster response costs, and loss of life. The GLO is proposing that local governments establish a building set-back line 60 times the erosion rate, as measured from the LOV. For example, a shoreline experiencing an erosion rate of 6 feet per year will need a building set-back line 360 feet from the LOV. Sixty times the erosion rate represents an approximate time period for depreciation of new buildings before being subjected to erosion, especially modern hotels and condominiums. Placing structures further landward is also important because natural dune processes are allowed to continue with minimal disturbance and the risk to life and property from storm damage and public expenses of disaster relief will be reduced. By placing structures (especially taller and larger structures) further landward, the additional hazards created by tall buildings when subjected to storm surge will be reduced. Further, the increased intensity of use associated with these large building complexes and the greater demand for public services, such as sewer and water, are minimized. Larger structures are more difficult to move, and create increased pressure on the state and local government for the construction of hard erosion control structures, further increasing public expenses.

The public will also benefit due to reduced storm damage loss to properties exempted from constructing landward of the building set-back line. Exempted properties, including property which has been previously platted but has an expired beachfront construction certificate or dune protection permit, property located adjacent to accreting beaches, or property with no practicable alternative to building landward of the set-back line, will be subject to stricter building standards. Additionally, existing structures and properties constructed seaward of the building set-back line will be protected by local government implementation of plans to improve foredune ridges and beach access points to protect against storm surge. Scientific and engineering studies considered by the GLO noted that during Hurricane Alicia in 1983, vegetation line retreat and landward extent of storm washover deposits were greater for developed areas than for natural areas (Bureau of Economic Geology Circular 85-5). This difference is attributed in part to the fact that naturally occurring vegetated dunes are stronger than reconstructed dunes due to greater root depths of dune vegetation. (Circular 85-5).

CONSISTENCY WITH CMP

The proposals to amend §§15.2, 15.3, 15.8, and 15.41 concerning definitions of small scale construction, large scale construction, and restoration; review periods for large and small scale construction; standard and expedited periods for review of local government beach and dune plans; establishment of the line of vegetation as prima facie evidence for the boundary of the public beach easement; and changes for beach user fee revenue accounts, as well as the new rule for local government Erosion Response Plans contained in §15.16, are subject to the Coastal Management Program (CMP), 31 TAC §505.11(c), relating to the Actions and Rules subject to the CMP. The GLO has reviewed these proposed actions for consistency with the CMP's goals and policies in accordance with regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.26 (relating to Policies for Construction in the Beach/Dune System).

Amendments proposed to §§15.2, 15.3, 15.8, and 15.41 consist of minor technical changes to procedures for review and certification by the GLO of dune protection and beach access plans adopted by local governments and for the review and comment by GLO of development plans submitted to local governments. These procedural changes do not involve substantive changes from the GLO's Beach/Dune Rules that the Council has previously found to be consistent with the CMP. The amended rules are consistent with the CMP goal outlined in 31 TAC §501.12(4) of ensuring and enhancing public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone. The amended rules pertaining to procedures for LOV determinations are also consistent with the CMP policies for construction in the beach/dune system contained in 31 TAC §501.26(a)(4) by ensuring the ability of the public, individually and collectively, to exercise its common law rights of use of and access to and from public beaches.

The new rule for local government Erosion Response Plans contained in §15.16 is consistent with the CMP goals outlined in 31 TAC §501.12(1), (2), (3), and (6). These goals seek protection of CNRAs, compatible economic development and multiple uses of the coastal zone, minimization of the loss of human life and property due to the impairment and loss of CNRA functions, and coordination of GLO and local government decision-making through the establishment of clear, effective policies for the management of CNRAs. ERPs will allow the GLO and local governments to develop plans that are tailored to the unique natural features, degree of development, storm, and erosion exposure potential of each area. The new rules for ERPs in 31 TAC §15.16 are also consistent with the CMP policies outlined in 31 TAC §501.26(a)(1) and (2) that prohibit construction within a critical dune area that results in the material weakening of dunes and dune vegetation or adverse effects on the sediment budget. ERPs will provide reduced impacts to critical dunes and dune vegetation by placement of structures further landward, reduce dune area habitat and biodiversity loss, and reduce structure en-

croachment on the beach which leads to interruption of the natural sediment cycle.

Consequently, the GLO has determined that the proposed actions are consistent with the applicable CMP goals and policies. The proposed amendments and new section will be distributed to Council members in order to provide an opportunity for comment on the consistency of the proposed rules.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed amendments to determine whether Texas Government Code, Chapter 2007 (Private Real Property Rights Preservation Act), is applicable and a detailed takings assessment is required. The GLO has determined that the proposed amendments do not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19 of the Texas Constitution. In the controlling legal authority on the issue, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), the U.S. Supreme Court found a constitutional taking where a construction set back line "denies all economically beneficial or productive use of land." The Court held that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property.

The Open Beaches Act does not create public beach access and use rights, but rather provides a system of administration and enforcement for the rights that exist under state common law. *State v. Markle,* 363 S.W.2d 332 (Tex. Civ. App.-Houston 1964, no writ). See also *Matcha v. Mattox,* 711 S.W.2d 95, 101 (Tex. App.-Austin 1986, writ ref'd n.r.e.) cert. denied, 481 U.S. 1024 (1987). State courts have recognized the establishment of a public beach easement for unrestricted travel and recreation uses by virtue of prescriptive right, implied dedication, and custom along various parts of the Texas Gulf shore. See, e.g. *Matcha,* 711 S.W.2d at 98-100 (public easement by custom on Galveston's West Beach); *Moody v. White,* 593 S.W.2d 372, 377-79 (Tex. Civ. App.-Corpus Christi 1979, no writ) (public easement by prescription and implied dedication to beach on Mustang Island), *Villa Nova Resort, Inc. v. State,* 711 S.W.2d 120, 127-28 (Tex. App.-Corpus Christi 1986, no writ) (public easement by prescription and implied dedication to beach on South Padre Island).

Since widespread public use of the shore historically occurred on the sand beach seaward of the vegetated dunes, the landward boundary of this public easement is commonly the line of vegetation. *Feinman v. State,* 717 S.W.2d 10, 111-114 (Tex. App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.), *Matcha,* 711 S.W.2d at 99-100. The ribbon of public easement on the dry beach is subject to widening and narrowing, as well as net migration landward and seaward, with the natural movements of the vegetation line and the high tide line. The amendments to §15.3 include procedures for insuring that identification of the LOV submitted by local governments and applicants for beachfront construction certificates is verified by the GLO in a manner consistent with statutory requirements provided in §61.016 and §61.017 of the Open Beaches Act.

These state law principles define the bundle of rights that property owners acquire when they purchase beachfront property. Because of shore dynamics, beachfront property owners purchase both the opportunity for property gain, as well as the risk of property loss. Under Texas property law, any right of beachfront property owner to exclude the public and to keep structures on these parcels extends seaward to the vegetation line, but that yields to a superior public right as the vegetation line retreats. State courts, recognizing the public's property rights, have ordered a variety of structures to be removed from the public beach easement, including a motel, a beach house under post-storm reconstruction, a bulkhead protecting a beach house from coastal erosion, and barriers to traffic along the beach.

The purpose of the proposed amendments is to provide alternative means and methods through an administrative process for determination of the LOV. The proposed regulations further the stated purpose and accomplish results that could be achieved in the courts of this state. The alternative to adoption of the administrative process outlined in the proposed regulations is to continue to rely on costly litigation to resolve issues related to enforcement of rights to public beach access and use that exist under state common law.

New §15.16 concerning Local Government Erosion Response Plans that establish and implement a building set-back line includes guidelines providing exemptions for property for which the owner has demonstrated that no practicable alternatives to construction seaward of the building set-back line exist. In addition, the guidelines allow some beneficial use of the property seaward of the set-back line for amenities. The definition of the term "practicable" in §15.2(55) of the Beach/Dune Rules allows a local government to consider the cost of implementing a technique such as the set-back provisions in determining whether it is "practicable" in a particular application for development. In applying its regulation, the local government could determine on a case-by-case basis to permit construction of habitable structures in the area seaward of the building set-back line and landward of the line of vegetation if it caused severe and unavoidable economic impacts and thus avoid an unconstitutional taking. In addition, new §15.16 and building set-back lines adopted by local governments under that section would not constitute a statutory taking under the Private Real Property Rights Preservation Act inasmuch as Texas Natural Resources Code §33.607(h) as added by HB 2819 provides that Chapter 2007, Government Code, does not apply to a rule or local government order or ordinance authorized by §33.607.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The proposed amendments are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking implements legislative requirements in Texas Natural Resources Code §§33.607, 61.011, 61.015, 61.020, 63.054, 63.056, and 63.121. These sections as amended by HB 2819 provide the GLO with the authority to adopt rules for the establishment and implementation of a building set-back line by a local

government as part of an ERP, rules for the preservation and enhancement of the public's right to use and have access to and from the public beaches of Texas, rules to certify that local government plans to manage the beach/dune system are consistent with state law, rules for determination of the LOV, and rules to insure that proposed construction meets the objectives of the Dune Protection Act.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking or its consistency with the CMP goals and policies, please send a written comment to Mr. Walter Talley, Texas Register, Liaison, Texas General Land Office, P.O. Box 12873, Austin, TX 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §§15.2, 15.3, 15.8, 15.16

STATUTORY AUTHORITY

The amendments and new rule are proposed under Texas Natural Resources Code §§33.607, 61.011, 61.015, 61.020, 63.054, 63.056, and 63.121. These sections as amended by HB 2819 provide the Commissioner of the GLO with the authority to adopt rules for the establishment and implementation of a building setback line by a local government as part of an ERP, rules for the preservation and enhancement of the public's right to use and have access to and from the public beaches of Texas, rules to certify that local government plans to manage the beach/dune system are consistent with state law, rules for determination of the LOV, and rules to insure that proposed construction meets the objectives of the Dune Protection Act.

Texas Natural Resources Code §§61.011, 61.015, 61.020, 63.054, 63.056, and 63.121 are affected and implemented by the proposed amendments and new rule.

§15.2. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (39) (No change.)

(40) Large-scale construction--Construction activity greater than 5,000 square feet or [~~in area and~~] habitable structures greater than two stories in height. Multiple-family habitable structures are typical of this type of construction.

(41) - (60) (No change.)

(61) Restoration--Repair or replacement of dunes or dune vegetation [~~The process of constructing man-made vegetated mounds, repairing damaged dunes, or vegetating existing dunes~~].

(62) - (65) (No change.)

(66) Small-scale construction--Construction activity less than or equal to 5,000 square feet or [~~and~~] habitable structures less than or equal to two stories in height. Single-family habitable structures are typical of this type of construction.

(67) - (70) (No change.)

§15.3. Administration.

(a) (No change.)

(b) Boundary of the public beach. The public beach is defined in the Open Beaches Act, §61.013(c), and §15.2 of this title (relating to Definitions). The line of vegetation is defined in the Open Beaches Act, §61.001(5), and §15.2 of this title [~~(relating to Definitions)~~]. The line of vegetation is typically used to determine the landward extent of the public beach. However, there are portions of the Texas coast where there is no marked vegetation line or the line is discontinuous or modified. In those portions of the coast, the line of vegetation shall be determined consistent with §15.10(b) of this title (relating to General Provisions) and the Open Beaches Act, §61.016 and §61.017.

(1) If there is no clearly marked line of vegetation, the "line of vegetation" delineating the public beach shall be the line of constant elevation connecting two clearly marked lines of vegetation of equal elevation on each side, but if there are no clearly marked lines of vegetation on each side, the "line of vegetation" shall not extend inland further than 200 feet from the seaward line of mean low tide.

(2) If there is no clearly marked line of vegetation, the "line of vegetation" delineating the public beach shall be the line of average elevation connecting two clearly marked lines of vegetation of unequal elevation on each side, but if there are no clearly marked lines of vegetation on each side, the "line of vegetation" shall not extend inland further than 200 feet from the seaward line of mean low tide.

(3) Individuals seeking line of vegetation determinations for a proposed purchase of property or for proposed construction must initially file a request with the local government having authority for Beachfront Construction Certificates/Dune Protection Permits. After review by the local government, the request may be forwarded to the General Land Office.

(4) When a Beachfront Construction Certificate/Dune Protection Permit application is submitted to the General Land Office for review and comment, the line of vegetation depicted on any map, aerial photograph, or other documentation shall be subject to verification by the General Land Office.

(5) The determination of the location of the line of vegetation by the commissioner of the General Land Office as provided by the Open Beaches Act, §61.016 and §61.017, constitutes prima facie evidence of the landward boundary of the area subject to the public easement until a court adjudication establishes the line in another place.

(c) Beachfront construction certification areas. The General Land Office[~~, in conjunction with the attorney general's office,~~] has the responsibility of protecting the public's right to use and have access to and from the public beach and of providing standards to the local governments certifying construction on land adjacent to the Gulf of Mexico consistent with such public rights. The Open Beaches Act, §61.011(d)(6), limits the geographic scope of the beachfront construction certification area to the land adjacent to and landward of public beaches and lying in the area either up to the first public road generally parallel to the public beach or to any closer public road not parallel to the beach, or the area up to 1,000 feet of mean high tide, whichever distance is greater. For this area, local governments shall prepare a beach access and use program, pursuant to the Open Beaches Act, §61.015, for inclusion in their dune protection and beach access plans to control any adverse effects of beachfront construction on public beach use and access. Applications for beachfront construction certificates shall be reviewed by local governments for consistency with their dune protection and beach access plans.

(d) - (e) (No change.)

(f) Establishment of dune protection lines. Pursuant to the authority provided in the Dune Protection Act, §63.011, local governments shall establish and maintain dune protection lines which pre-

serve, at a minimum, the dunes within the critical dune areas as defined in this subchapter. The establishment of the line should include the protection of critical dune areas from erosion caused by development on adjacent land. Accordingly, the Dune Protection Line should be established in a location that will allow local governments to implement Texas Natural Resources Code, §33.607 and §15.16 of this title (relating to Local Government Erosion Response Plans). A local government must conduct a field inspection to determine the approximate location of the line unless it proposes to establish or relocate its line at a distance of 1,000 feet of mean high tide of the Gulf of Mexico, as that 1,000 feet is the maximum extent of the local government's jurisdiction for establishing dune protection lines.

(g) - (l) (No change.)

(m) Local government authority. Local governments shall include in the plans submitted to the General Land Office [~~and the attorney general's office~~] citations of all statutes, policies, and ordinances which demonstrate the authority of the local government to implement and enforce the plan in a manner consistent with the requirements of this subchapter. Local government plans shall also demonstrate the coordination, on the local level, of the dune protection, beach access, erosion response, and flood protection programs (if participating in the National Flood Insurance Program under the National Flood Insurance Act). Each local government shall integrate these programs into one plan for the management of the beach/dune system within its jurisdiction. The General Land Office will provide written guidance on the form and content of the plan upon written request by a local government.

(n) (No change.)

(o) Submission of local government plans to the General Land Office [~~state agencies~~]. Local governments shall submit dune protection and beach access plans to the General Land Office for review, comment, and certification as to compliance with this subchapter, the Dune Protection Act, and the Open Beaches Act [~~and to the attorney general's office for review and comment~~].

(1) (No change.)

(2) Review of Plan Amendments. The General Land Office shall either grant or deny certification of a local government's formally approved dune protection and beach access plan within 90 [~~60~~] days of receipt of the plan.

(A) Depending upon the degree or complexity of modifications contained in the plan amendment, the local government may request a review period shorter than 90 days based on the following guidelines:

(i) Expedited Review period of 30 days may be requested for review of a plan amendment that is administrative in nature and does not contain variances nor substantially alter beach access or dune protection.

(ii) Standard Review period of 60 days may be requested for review of a plan amendment that does not contain any changes to beach user fees, beach access points, changes to vehicular access, nor substantially alter beach access or dune protection.

(iii) The local government shall provide a reasoned justification with any request for a review period of less than 90 days. It must include a detailed description of the proposed changes that will result from the amendment.

(iv) The General Land Office will make a determination on the eligibility of an amendment for a shortened review period and notify the local government of the determination within ten working days (to run concurrently with the applicable review period) from the date the request and complete package of information regarding the proposed amendment is received. Review of plan amendments that do not qualify for a shortened review period will be completed by the General Land Office within the allowed 90 day period.

(B) In the event of denial, the General Land Office shall send the plan back to the local government with a statement of specific objections and the reasons for denial of certification, along with suggested modifications. On receipt, the local government shall revise and resubmit the plan for [~~state agency~~] review.

(3) - (4) (No change.)

(5) Subsequent to initial certification, local governments may amend their dune protection and beach access plans by submitting the proposed changes to the General Land Office for review, comment, and certification [~~and to the attorney general's office for review and comment~~].

(6) (No change.)

(p) Submission deadline for dune protection and beach access plans. Local governments shall submit dune protection and beach access plans to the General Land Office [~~and the attorney general's office~~] no later than 180 days from the effective date of this subchapter. If the General Land Office does not approve a plan, the local government shall submit revisions of the plan until the plan is approved. However, any local government that submits a revised plan that has not been modified to address the state comments regarding the statutory requirements and the minimum standards identified in this subchapter is presumed to be in violation of this subchapter, the Open Beaches Act, and the Dune Protection Act. Local governments that fail to submit plans within 180 days of the effective date of this subchapter will be liable for penalties as provided in §15.9 of this title (relating to Penalties). Further, local governments that fail to submit plans by that deadline will not be authorized to permit construction within the geographic scope of this subchapter.

(q) - (r) (No change.)

(s) Acts prohibited without a dune protection permit or beachfront construction certificate. An activity requiring a dune protection permit may typically also require a beachfront construction certificate and vice versa. Local governments shall, whenever possible, issue permits and certificates concurrently when an activity requires both. In their dune protection and beach access plans, local governments may combine the dune protection permit and the beachfront construction certificate into a single permit or a two-part permit; however, they are not required to do so.

(1) - (5) (No change.)

(6) General Land Office [~~State agency~~] comments.

(A) A person proposing to conduct an activity for which a permit or certificate is required shall submit a complete application to the appropriate local government. The local government shall forward the complete application, notice of public hearing, and [~~including~~] any associated materials[~~,~~] to the General Land Office [~~and the attorney general's office~~]. The application, hearing notice, any documents associated with the application, and information as to when the decision will be made must be received by the General Land Office [~~and the attorney general's office~~] no later than ten working days for small scale construction and 30 working days for large scale construction before the date of the local government's public hearing on the application or when the local government is first scheduled to act on the permit or certificate. [~~Local governments shall not act on a permit or certificate application if the General Land Office and the attorney general's office have not received the application for the permit or certificate at least~~

~~ten working days before the local government is first scheduled to act on the permit or certificate. However, a~~] A local government may act on such applications following the public hearing or a decision by the commissioner's court or municipal governing body if the General Land Office [~~state agencies~~] received the application within the proper time frame and the state provides comments or does not submit comments on the application to the local government.

(B) The General Land Office [~~and the attorney general's office~~] may submit comments on the proposed activity to the local government. The review period for comments of ten working days for small scale construction and 30 working days for large scale construction is initiated only after the receipt by the General Land Office of all information required by this section.

(7) Local government review. When determining whether to approve a proposed activity, a local government shall review and consider:

(A) - (C) (No change.)

(D) the comments of the General Land Office [~~the attorney general's office~~]; and

(E) (No change.)

(t) (No change.)

(u) Administrative record.

(1) (No change.)

(2) Local governments shall keep the administrative record for a minimum of three years from the date of a final decision on a permit or certificate. Local governments shall send to the General Land Office [~~or the attorney general's office,~~] upon request [~~by either agency,~~] a copy of those portions of the administrative record that were not originally sent to those agencies for permit or certificate application review and comment. The record must be received by the General Land Office [~~appropriate agency~~] no later than ten working days after the local government receives the request. The General Land Office [~~state agency reviewing the administrative record~~] shall notify the appropriate permittee of the request for a copy of the administrative record from the local government. Upon request of the permittee, a local government shall provide to the permittee copies of any materials in the administrative record regarding the permit or certificate which were not submitted to the local government by the permittee (i.e., the permit application) or given to the permittee by the local government (i.e., the permit).

§15.8. Beach User Fees.

(a) - (f) (No change.)

(g) Beach user fee accounts. Local governments shall use [~~follow~~] the following methods for administering beach user fee accounts.

(1) Beach user fee revenues shall be maintained and accounted for so that fee collections may be directly traced to expenditures on beach-related services. Beach user fee revenues shall not be commingled with any other funds and shall be maintained in separate revenue [~~bank~~] accounts.

(2) Beach user fee revenues shall be maintained in a separate revenue account and documented in a separate financial statement for each beach user fee. Beach user fee revenue account balances and expenditures shall be documented according to generally accepted accounting principles.

(h) - (k) (No change.)

§15.16. Local Government Erosion Response Plans.

(a) Pursuant to the authority granted by Texas Natural Resources Code, §33.607, local governments may develop plans for reducing public expenditures for erosion and storm damage losses to public and private property, including public beaches. The Erosion Response Plan (ERP) should be prepared in consultation with the General Land Office and include the following elements:

(1) A building set-back line that will accommodate a shoreline retreat. The local government should consider the following technical standards in establishing a building set-back line:

(A) Historical erosion rates as determined by the University of Texas at Austin, Bureau of Economic Geology. The preferred approach to using the historical erosion rate is a distance of no less than the greater of:

(i) 60 times the annual erosion rate, measured from the line of vegetation, or

(ii) 25 feet landward of the landward toe of the foredune ridge, or if there is no foredune ridge, 300 feet landward of mean high water of the Gulf of Mexico.

(B) The line of vegetation (LOV). The LOV, which is determined by procedures established in the Open Beaches Act, should be the initial reference feature for determining the distance landward to establish the building set-back line.

(C) The dune protection line (DPL). The building set-back line may not be located further landward than the DPL, which is established by a local government under the Dune Protection Act and updated as specified in §15.3(k) of this title (relating to Local Government Review of Dune Protection Line Location). The building set-back line should protect as much of the critical dune area as possible.

(2) A prohibition on new construction seaward of the building set-back line. The prohibition criteria should include at least the following minimum components:

(A) To the extent practicable, all habitable structures shall be constructed landward of the building set-back line.

(B) Construction seaward of the building set-back line should be limited to amenities located at least 25 feet landward of the landward toe of the foredune ridge or, if there is no foredune ridge, 300 feet landward of mean high water of the Gulf of Mexico, provided that the impervious cover requirements of §15.5(b)(3) and §15.6(f)(3) are followed and the applicant demonstrates that every attempt has been made to minimize use of impervious surfaces in this area.

(C) Construction of structures landward of the building set-back line establishes a rebuttable presumption that the permittee has followed the mitigation sequence requirements for avoidance and minimization of effects on dunes and dune vegetation specified in §15.4(f) of this title (relating to Mitigation). However, the permittee is not exempt from compliance with compensatory mitigation requirements for unavoidable adverse effect on dunes and dune vegetation.

(D) The local government should develop criteria for identifying properties located entirely seaward of the building set-back line, providing for acquisition of fee simple title or a lesser interest in such properties, and techniques for prioritizing properties to be acquired.

(3) Exemptions from the prohibition of residential and commercial construction seaward of the building set-back line.

(A) Properties in areas which have demonstrated historical accretion of greater than two feet per year as determined by the University of Texas at Austin, Bureau of Economic Geology.

(B) Properties for which the owner has demonstrated to the satisfaction of the local government that no practicable alternatives to construction seaward of the building set-back line exist. For purposes of this section, practicable means available and capable of being done after taking into consideration existing building practices, costs, siting alternatives, and the footprint of the structure in relation to the area of the buildable portion of the lot, and considering the overall development scheme for the property.

(C) Properties for which construction is permitted under a dune protection and beach access plan establishing a building set-back line certified by the General Land Office prior to the effective date of this section.

(D) Structures located seaward of the building set-back line prior to the effective date of this section for which modifications are sought that do not increase the footprint of the structure. However, structures seaward of the building set-back line that are damaged more than 50% or destroyed by a meteorological event should be subject to this section before any repairs or reconstruction may be conducted. These properties with damaged structures may be considered in the ERP for acquisition of fee simple title to or a lesser interest in the property.

(E) Previously platted subdivision lots that were the subject of an expired beachfront construction certificate or dune protection permit or that were part of a master planned development, the plans for which were previously approved and adopted by the governing body of the local government, provided that the construction authorized by a new permit or certificate is consistent with the prior permit, certificate, or master plan.

(4) Construction requirements for properties exempt from the prohibition for building seaward of the building set-back line. Requirements should include the following:

(A) A minimum three-foot freeboard above base flood elevation (BFE);

(B) Open foundations;

(C) Certification by a registered professional engineer or architect as to the adequacy of elevated building foundations and the proper placement, compaction, and protection of fill when used as construction for all newly constructed, substantially damaged, and substantially improved buildings elevated on pilings, posts, piers, or columns so that the bottom of the lowest horizontal structural member of the lowest floor (excluding the vertical foundation members) is at or above the BFE;

(D) Submission of a plan prepared by a registered professional engineer for feasible relocation of any habitable structure less than 5,000 square feet; and

(E) Where practicable, all construction should be located at least 25 feet landward of the landward toe of the foredune ridge or, if there is no foredune ridge, 300 feet landward of mean high water of the Gulf of Mexico.

(5) Procedures for preserving and enhancing the public's right of access to and use of the public beach from losses due to erosion and storm damage. The ERP should identify specific areas of public access that require protection from erosion and storm surge and list goals and implementation schedules for design improvements, including but not limited to incorporation of humps and oblique or meandering approaches.

(6) Procedures for preserving, restoring, and enhancing critical sand dunes for natural storm protection and conservation purposes. The ERP should identify specific goals and implementation schedules for protecting dunes, ensuring that existing dunes protect inland areas against a 100-year storm surge, and provide for dune restoration projects to fill gaps in the foredune ridge created by private access and blowouts, as applicable.

(b) The local government shall hold a public educational meeting on the ERP before implementation. The meeting may be held in conjunction with the formal hearing required for establishment of a new DPL, as outlined in §15.3(l) of this title (relating to Provisions for Public Hearings on Dune Protection Lines). If held separately from the hearing on a new DPL, the meeting shall be advertised in the same manner outlined in §15.3(l) of this title.

(c) The ERP shall be submitted to the General Land Office for review and approval as a dune protection and beach access plan amendment following the procedures outlined in §15.3(o) of this title (relating to Submission of Local Government Plans to the General Land Office).

(1) A local government's governing body should formally approve the ERP prior to submission to the General Land Office. The General Land Office shall either grant or deny certification of the local government's ERP within 90 days from receipt, as outlined in §15.3(o) of this title. Certification will be based upon the following criteria:

(A) The ERP should clearly demonstrate how public expenditures will be reduced because of measures incorporated into the ERP;

(B) The ERP should clearly demonstrate that the building set-back line will be effective in moving construction landward;

(C) The ERP should identify potential sources of funding for acquiring fee simple title to or a lesser interest in properties seaward of the building set-back line;

(D) The ERP should incorporate measures to protect public access and critical dunes and support such measures through goals and implementation schedules;

(E) If the ERP includes a variance from other requirements or prohibitions of this chapter, the local government must provide a reasoned justification for the variance in accordance with §15.3(o)(6) of this title; and

(F) Construction prohibitions, exemptions, and requirements of the ERP should be incorporated into the local government procedures for reviewing and approving permit applications.

(2) In the event of denial, the General Land Office shall send the ERP back to the local government with a statement of specific objections and the reasons for denial of certification, along with suggestions for modifications. On receipt of the denial, the local government may revise and resubmit the ERP for General Land Office review.

(3) A local government implementing an ERP pursuant to this section must ensure that the ERP is consistent with other provisions of its dune protection and beach access plan through appropriate amendments and incorporate the ERP into the local government dune protection and beach access plan as a separate appendix that clearly identifies portions of the dune protection and beach access plan that implements the ERP. The ERP must be updated every five years concurrent with the five-year update of the DPL.

(4) In order to be fully considered by the Commissioner of the General Land Office (commissioner) for an expenditure related to a Coastal Planning and Response Account (CEPRA) project, a local government must adopt and submit the ERP to the General Land Office for certification no later than December 31 immediately preceding the state fiscal biennium in which funding is sought. Provided, however,

for consideration by the commissioner for an expenditure related to a CEPRA project in the state fiscal biennium beginning September 1, 2009, a local government must submit a draft ERP to the General Land Office no later than July 1, 2009. An amendment or change to the ERP sought by a local government or resulting from the required five-year update must be submitted to the General Land Office no later than July 1 immediately preceding the state fiscal biennium in which funding is sought.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 2, 2008.

TRD-200802342
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 475-1859

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SUBCHAPTER B. COASTAL EROSION PLANNING AND RESPONSE

31 TAC §15.41

STATUTORY AUTHORITY

The amendment is proposed under Texas Natural Resources Code §33.602(c) which provides the Commissioner of the GLO with authority to adopted rules necessary to implement Texas Natural Resources Code, Subchapter H (the Coastal Erosion Planning and Response Act) and Texas Natural Resources Code §33.605 which requires the Commissioner to consider whether a local government is adequately administering a building set-back line established under Texas Natural Resources Code §33.607 in determining whether to approve an expenditure from the Coastal Erosion Response Account for a coastal erosion study or project within a local government's jurisdiction.

Texas Natural Resources Code §33.605 and §33.607 are affected and implemented by the proposed amendment.

§15.41. Evaluation Process for Coastal Erosion Studies and Projects.

The General Land Office (Land Office) will evaluate potential projects proposed by potential project partners for funding from the coastal erosion response account (Account) based on a two-stage evaluation process as described in this section, including an initial evaluation of project goal summaries followed by a further evaluation of preferred alternatives.

(1) Initial evaluation of project goal summaries submitted to the Land Office by potential project partners.

(A) - (B) (No change.)

(C) The Land Office will evaluate project goal summaries received based on the following criteria:

(i) - (v) (No change.)

(vi) if the project is located within the jurisdiction of a local government that administers a beach/dune program: [;]

(I) whether the local government is adequately administering its duties under the Open Beaches Act (Texas Natural Resources Code, Chapter 61) and the Dune Protection Act (Texas Natural Resources Code, Chapter 63); and

(II) whether the local government has implemented a building set-back line established under Texas Natural Resources Code, §33.607, and §15.16 of this title (relating to Local Government Erosion Response Plans);

(vii) - (xi) (No change.)

(D) - (E) (No change.)

(2) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
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For further information, please call: (512) 475-1859

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER NN. FIREWORKS TAX

34 TAC §3.1281

The Comptroller of Public Accounts proposes an amendment to §3.1281, concerning fireworks tax. The amendment implements House Bill 539, 80th Legislature, 2007, which changed Occupations Code, §2154.202, to include a period beginning May 1 and ending at midnight on May 5 as a period during which a retail fireworks permit holder is authorized to sell fireworks to the public if the fireworks are sold at a location that is not more than 100 miles from the Texas-Mexico border in a county in which the commissioners court has approved the sale of fireworks during that period. The definition of "sales tax" has been added to subsection (a) of the rule. The list of items that are excluded from the fireworks tax base has been moved from subsection (b) and combined with the exemption information under subsection (d). The caption for subsection (d) has been changed to reflect that reorganization. The payment provisions in subsection (e) have been reorganized under subsections (f) - (h). Due date information has been moved to subsection (f) and expanded to provide a due date of August 20 for remittance of fireworks tax collected during the new May 1 - May 5 sales period; the original effective date for the fireworks tax has been deleted from the subsection. Information regarding prepayment and timely filing discounts is found under new subsection (g); and late payment penalty and interest is covered under new subsection (h).

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the amendment would benefit the public by clarifying the requirements for certain taxpayers subject to the fireworks tax. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002 and §111.0022, which provide the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The amendment implements Tax Code, Chapter 161, and Occupations Code, §2154.202(g)(3).

§3.1281. Fireworks Tax.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Fireworks--Any composition or device that is designed to produce a visible or audible effect by combustion, explosion, deflagration, or detonation that is classified as Division 1.4G explosives by the United States Department of Transportation in 49 C.F.R. Part 173 as of September 1, 1999. Examples of fireworks include items that are commonly known as firecrackers, bottle rockets, Roman candles, and shooting stars.

(2) Retail sale--Any sale of fireworks directly to the public.

(3) Sales tax--The tax imposed by Tax Code, Chapter 151.

(b) Imposition. A 2.0% tax is imposed on the retail sale of fireworks in Texas. The fireworks [~~This~~] tax imposed under Tax Code, Chapter 161, is in addition to any state and local sales taxes that are due on the retail sale of fireworks. [~~Tax Code, §161.005, directs the comptroller to allocate the revenue collected under this tax to the rural volunteer fire department fund that is established under Government Code, §614.075. The following items are excluded from the fireworks tax, but may be subject to sales tax:~~]

[~~(1) a toy pistol, toy cane, toy gun, or other device that uses a paper or plastic cap;~~]

[~~(2) a model rocket or model rocket motor that is designed, sold, and used for the purpose of propelling a recoverable aero model;~~]

[~~(3) a propelling or expelling charge that consists of a mixture of sulfur, charcoal, and potassium nitrate;~~]

[~~(4) a novelty or trick noisemaker;~~]

[~~(5) a pyrotechnic signaling device or distress signal that is designed for marine, aviation, or highway use in an emergency situation;~~]

[~~(6) a fusee or railway torpedo for use by a railroad;~~]

[~~(7) a blank cartridge that is sold for use in a radio, television, film, or theater production, for signal or ceremonial purposes in athletic events, or for industrial purposes; or~~]

[~~(8) a pyrotechnic device that is sold for use by a military organization.~~]

(c) Collection. Each seller must collect the fireworks tax from the purchaser on the total price of each retail sale of fireworks in Texas. The fireworks tax is collected in the same manner as sales tax. See §3.286 of this title (relating to Seller's and Purchaser's Responsibilities) for information on the collection and remittance of sales tax.

(d) Exclusions and exemptions [~~Exemptions~~].

(1) The following items are excluded from the fireworks tax base, but retail sales of these items may be subject to sales tax:

(A) a toy pistol, toy cane, toy gun, or other device that uses a paper or plastic cap;

(B) a model rocket or model rocket motor that is designed, sold, and used for the purpose of propelling a recoverable aero model;

(C) a propelling or expelling charge that consists of a mixture of sulfur, charcoal, and potassium nitrate;

(D) a novelty or trick noisemaker;

(E) a pyrotechnic signaling device or distress signal that is designed for marine, aviation, or highway use in an emergency situation;

(F) a fusee or railway torpedo for use by a railroad;

(G) a blank cartridge that is sold for use in a radio, television, film, or theater production, for signal or ceremonial purposes in athletic events, or for industrial purposes; or

(H) a pyrotechnic device that is sold for use by a military organization.

(2) [~~(1)~~] No fireworks tax is due on a sale that is exempt from sales tax.

(3) [~~(2)~~] A seller who accepts a valid and properly completed resale or exemption certificate for sales tax is not required to collect the fireworks tax. All sales that are unsupported by valid resale or exemption certificates or by other exemption documentation acceptable under the law are considered to be retail sales, and the seller will be liable for the fireworks tax on those sales.

(e) Reports [~~and payments~~]. A seller must report the fireworks tax to the comptroller on forms that the comptroller prescribes. A seller who fails to receive the correct form from the comptroller is not relieved of the responsibility for filing a fireworks tax report and for payment of the tax by the due date.

[~~(1) A seller must report and remit fireworks tax on or before August 20 on sales that occur during the period that begins June 24 and ends midnight July 4. A seller must report and remit fireworks tax on or before February 20 on sales that occur during the period that begins December 20 and ends midnight January 1.~~]

[~~(2) A seller must report and pay the fireworks tax to the comptroller on forms that the comptroller prescribes. A seller who fails to receive the correct form from the comptroller is not relieved of the responsibility for filing a fireworks tax report and for payment of the tax by the due date.~~]

[~~(3) The penalties and interest that are imposed for failure to timely file and pay the fireworks tax are the same as those that are imposed for failure to timely file and pay sales tax. Likewise, the 0.5% discount for timely filing and payment applies to fireworks tax reports and payments. No prepayment discount will be allowed for prepayment of the fireworks tax. See §3.286 of this title.~~]

(f) Due dates for reports and payments. A seller must report and remit fireworks tax on or before the applicable due date for the

sales period. The due dates are: [~~Effective date. The fireworks tax is effective October 1, 2001.~~]

(1) August 20 for tax collected on sales that occur during:

(A) the period that begins May 1 and ends at midnight on May 5 at a location that is not more than 100 miles from the Texas-Mexico border in a county in which the commissioners court has approved the sale of fireworks during that period; and

(B) the period that begins on June 24 and ends at midnight on July 4; and

(2) February 20 for tax collected on sales that occur during the period that begins December 20 and ends at midnight on January 1.

(g) Prepayment and timely filing discounts.

(1) The 1.75% sales tax prepayment discount does not apply to fireworks tax.

(2) A seller who timely files the fireworks report and pays the tax due on or before the applicable due date may retain 0.5% of the gross fireworks tax due.

(h) Late payment penalty and interest.

(1) If the tax is paid or postmarked one to 30 days after the due date, a penalty of 5.0% of the tax due is imposed.

(2) If the tax is paid or postmarked more than 30 days after the due date, a penalty of 10% of the tax due is imposed.

(3) If the tax is paid or postmarked more than 60 days after the due date, interest is also due on the late payment. Interest is applied at the applicable annual rate to the amount of the delinquent tax due, exclusive of any late penalty. The comptroller publishes the annual interest rate online at www.window.state.tx.us and by phone at 1-877-44RATE4.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802229
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER U. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM POLICIES

37 TAC §1.261

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of §1.261, concerning Historically Underutilized Business Program Policies. Repeal of the section is necessary due to substantial changes being made. The repeal is filed simultaneously with a proposal for new §1.261 which will promulgate the department's rules regarding Historically Underutilized Businesses.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect, there will be no fiscal implications for state or local government, or local economies.

Mr. Ybarra has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal. There are no anticipated economic costs to persons who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Government Code does not apply to this repeal. Accordingly, the department is not required to complete a takings impact assessment regarding this repeal.

Comments on the repeal may be submitted to Kevin Jones, CTPM, Procurement and Contract Administration, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0130, (512) 424-2071.

The repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §2161.003.

Texas Government Code, §411.004(3), and §2161.003 are affected by this repeal.

§1.261. General Policy.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 30, 2008.

TRD-200802287

Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 424-2135

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37 TAC §1.261

The Texas Department of Public Safety proposes new §1.261, concerning the Historically Underutilized Business (HUB) Program. New §1.261 is necessary in order to promulgate rules to comply with Texas Government Code, §2161.003, which requires the department to adopt the Comptroller's HUB Program rules as our own. The proposal is being filed simultaneously with the repeal of current §1.261.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments regarding the new section may be submitted to Kevin Jones, CTPM, Procurement and Contract Administration, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0130, (512) 424-2071.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §2161.003.

Texas Government Code, §411.004(3), and §2161.003 are affected by this proposal.

§1.261. Historically Underutilized Business (HUB) Program.

Pursuant to §2161.003 of the Texas Government Code and to the extent applicable, the Texas Department of Public Safety adopts by reference the Historically Underutilized Business Program rules of the Texas Comptroller of Public Accounts ("Comptroller"), including any changes the Comptroller adopts hereafter. The rules may be found at 34 TAC §§20.11 - 20.28.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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CHAPTER 6. LICENSE TO CARRY HANDGUNS

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §6.1, §6.2

The Texas Department of Public Safety proposes amendments to Chapter 6, §6.1 and §6.2, concerning General Provisions. Amendments to §6.1 reformat the section in order to delete redundant information which is already contained in the Act and provide for clarification. Amendments to §6.2 are necessary in order to update the rule to reflect current statutory requirements and practices.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the sections as proposed. There are no anticipated economic costs to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to these rules. Accordingly, the Department is not required to complete a takings impact assessment regarding these rules.

Comments on the proposal may be submitted to Steve Moninger, Legal Staff, Regulatory Licensing Service, Texas Department of

Public Safety, P.O. Box 4143, Austin, Texas 78765-0242, (512) 424-5834.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Government Code, §411.197.

Texas Government Code, §411.004(3) and §411.197 are affected by this proposal.

§6.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--Texas Government Code, Chapter 411, Subchapter H.

[(2) Active judicial officer--A person serving as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.]

(2) [(3)] Applicant--A license applicant or an instructor applicant.

(3) [(4)] Certified handgun instructor--A [qualified] handgun instructor who has been instructed and qualified by the department to instruct in the use of handguns specifically for the purpose of training applicants for a concealed handgun license.

[(5) Chemically dependent person--A person who:]

[(A) frequently or repeatedly becomes intoxicated by excessive indulgence in alcohol or uses controlled substances or dangerous drugs so as to acquire a fixed habit and an involuntary tendency to become intoxicated or use those substances as often as the opportunity is presented;]

[(B) has been convicted two times within the 10-year period preceding the date on which the person applies for a license of an offense of the grade of Class B misdemeanor or greater that involves the use of alcohol or a controlled substance as a statutory element of the offense;]

[(C) is an unlawful user of or addicted to any controlled substance; or]

[(D) is an addict, as defined by United States Code §802.]

[(6) Concealed handgun--A handgun, the presence of which is not openly discernible to the ordinary observation of a reasonable person.]

[(7) Controlled substance--has the meaning assigned by 21 United States Code §802.]

[(8) Convicted--An adjudication of guilt or an order of deferred adjudication entered against a person by a court of competent jurisdiction for an offense under the laws of this state, another state, or the United States, whether or not the imposition of the sentence is subsequently probated and the person is discharged from community supervision. The term does not include an adjudication of guilt or an order of deferred adjudication which has been subsequently:]

[(A) expunged; or]

[(B) pardoned under the authority of a state or federal official.]

[(9) Delinquent Conduct--Has the meaning assigned by Family Code, §51.03.]

(4) [(10)] Department--The Texas Department of Public Safety, including employees of the department.

(5) [(11)] Director--The Director of the Texas Department of Public Safety or the Director's designee.

(6) [(12)] Director's designee--For purposes of conducting background investigations under this chapter, refers to an employee of the department, unless otherwise specified by the Director.

[(13) Finally determined--whether a person has been finally determined to be delinquent in the payment of taxes, student loans, or child support payments will be determined by the agency reporting the delinquency to the Department.]

[(14) Handgun--Has the meaning assigned by Texas Penal Code, §46.01.]

[(15) Instructor applicant--A person who applies for certification, either original or renewed, as a qualified handgun instructor.]

[(16) Intoxicated--Has the meaning assigned by Texas Penal Code, §49.01.]

[(17) License applicant--An applicant for a license, either original or renewed, to carry a concealed handgun under the Act.]

(7) [(18)] License holder--A person licensed to carry a concealed handgun under the Act.

[(19) Qualified handgun instructor--A person who is certified by the department to instruct in the use of handguns.]

(8) [(20)] Residence--One's [Domicile; that is, one's] home and fixed place of habitation to which one [he] intends to return after any temporary absence. The term "residence" has the meaning assigned in §15.25 of this title (relating to Address).

[(21) Retired judicial officer--A special judge appointed under Texas Government Code, §26.023 or §26.024; or a senior judge designated under Texas Government Code, §75.001; or a judicial officer as designated or defined by Texas Government Code, §75.001, §831.001, or §836.001.]

§6.2. Method of Payment.

(a) Payment to the department of any fee required by this chapter or by the Act may be made [only] by personal check, cashier's check, money order, or by check issued by a federal, state, or local government agency, made payable to the Texas Department of Public Safety. In addition, the department will accept payment by approved credit cards for applications submitted electronically using TexasOnline. Cash payments may be made only in person at the designated location of the Department of Public Safety Headquarters in Austin, Texas [online using the department website].

(b) A fee received by the department under this chapter or the Act is nonrefundable.

(c) An individual whose fee payment by personal check or credit card is dishonored or returned will be disqualified from using online application services in the future and will be required to pay all future fees by money order or cashier's check.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200802289

Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 424-2135

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37 TAC §§6.3 - 6.5

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of Chapter 6, §§6.3 - 6.5, concerning General Provisions. Repeal of the sections is necessary in order to delete redundant information which is already contained in the Act.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the proposal may be submitted to Steve Moninger, Legal Staff, Regulatory Licensing Service, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-0242, (512) 424-5834.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Government Code, §411.197.

Texas Government Code, §411.004(3) and §411.197 are affected by this proposal.

§6.3. Correspondence.

§6.4. Notice Required on Certain Premises.

§6.5. Notice Optional on Other Premises.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200802290
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER B. ELIGIBILITY AND APPLICATION PROCEDURES

37 TAC §§6.11 - 6.21

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of Chapter 6, §§6.11 - 6.21, concerning Eligibility and Application Procedures. Repeal of the sections is necessary in order to delete redundant information already contained in the Act or because it does not reflect current practices. This repeal is filed simultaneously with a proposal for new §§6.11 - 6.15 which will promulgate eligibility and application procedures.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the proposal may be submitted to Steve Moninger, Legal Staff, Regulatory Licensing Service, Texas Department of

Public Safety, P.O. Box 4143, Austin, Texas 78765-0242, (512) 424-5834.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Government Code, §411.197.

Texas Government Code, §411.004(3) and §411.197 are affected by this proposal.

§6.11. Eligibility for License To Carry a Concealed Handgun.

§6.12. Preliminary Application Procedure: Application Request Card.

§6.13. Preliminary Review and Determination by the Department.

§6.14. Proficiency Requirements.

§6.15. Basic Application Materials Required.

§6.16. Special Application Procedures and Fees.

§6.17. Application Review and Background Investigation.

§6.18. License Issuance.

§6.19. Duplicate License; Notice of Change of Address or Name.

§6.20. Modified License.

§6.21. Renewal of License.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Thomas A. Davis, Jr.
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Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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37 TAC §§6.11 - 6.15

The Texas Department of Public Safety proposes new Chapter 6, §§6.11 - 6.15, concerning Eligibility and Application Procedures. The new sections set forth eligibility and application procedures for licensing persons to carry concealed handguns. The new sections are filed simultaneously with the repeal of current §§6.11 - 6.21 and are necessary due to several sections having been renumbered and updated in order to conform to current practices

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the new sections are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the new sections as proposed. The anticipated economic costs to individuals who are required to comply with the new sections as proposed will be the actual cost of an original license or renewal. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the new sections are in effect, the public benefit anticipated as a result of enforcing the new sections will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to these new sections. Accordingly, the Department is not required to complete a takings impact assessment regarding these new sections.

Comments on the proposal may be submitted to Steve Moninger, Legal Staff, Regulatory Licensing Service, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-0242, (512) 424-5834.

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Government Code, §411.197.

Texas Government Code, §411.004(3) and §411.197 are affected by this proposal.

§6.11. Proficiency Requirements.

(a) The proficiency demonstration course will be the same for both instructors and license applications. The course of fire will be at distances of three, seven, and fifteen yards, for a total of fifty rounds.

(1) Twenty rounds will be fired from three yards, as follows:

(A) five rounds will be fired "One Shot Exercise"; two seconds allowed for each shot;

(B) ten rounds will be fired "Two Shot Exercise"; three seconds allowed for each two shots; and

(C) five rounds will be fired; ten seconds allowed for five shots.

(2) Twenty rounds will be fired from seven yards, fired in four five-shot strings as follows:

(A) the first five shots will be fired in ten seconds;

(B) the next five shots will be fired in two stages:

(i) two shots will be fired in four seconds; and

(ii) three shots will be fired in six seconds.

(C) the next five shots at seven yards will be fired "One Shot Exercise"; three seconds will be allowed for each shot; and

(D) the last five shots fired at the seven-yard line, the time will be fifteen seconds to shoot five rounds.

(3) Ten rounds will be fired from fifteen yards, fired in two five-shot strings as follows:

(A) the first five shots will be fired in two stages:

(i) two shots fired in six seconds; and

(ii) three shots fired in nine seconds.

(B) the last five shots will be fired in fifteen seconds.

(b) A student must score at least 70% on the written examination and shooting proficiency examination to obtain a proficiency certificate. A student will have three (3) opportunities to pass the written examination and shooting proficiency examination.

(c) An instructor must submit failures of the written examination or shooting examination to the department on the class completion notification and must indicate if the failure occurred after the student had been given three (3) opportunities to pass the examination.

§6.12. Basic Information to be Submitted with Application.

In addition to the information required by the Act, an application must contain all the following items:

(1) Proficiency certificate. The applicant must submit a handgun proficiency certificate (TR 100) issued upon successful completion of a handgun proficiency course approved by the department and taught by a certified handgun instructor. A proficiency certificate submitted by an original applicant will not be accepted by the department if it is more than two years old. A proficiency certificate submitted by a renewal applicant will not be accepted by the department if it is more than six months old.

(2) Driver License Number. An applicant shall provide a valid driver license number or identification certificate number issued by the department or by the issuing agency in the state of residence for non-resident applicants. Non-resident applicants and license holders must submit color photocopies of the front and back of their valid driver license or identification card issued by the appropriate state agency in their home state.

(3) Two recent color passport photographs of the applicant. The applicant shall submit two identical photographs of the applicant to the person who fingerprints the applicant, as detailed in paragraph (4) of this section. The photographs must be un-retouched color prints. Snapshots, vending machine prints, and full length photographs will not be accepted. The photographs must be 2 inches by 2 inches in size and printed on photo quality paper. The photographs must be taken in normal light, with white or off-white background. The photographs must present a good likeness of the applicant taken within the last six months. The applicant should be in normal attire and may not be wearing a hat or dark glasses. Unless worn daily for religious purposes, all hats or headgear must be removed for the photograph. In all cases, no item or attire may cover or otherwise obscure any part of the face. Eyeglasses worn on a daily basis may be worn for the photograph. However, there must be no reflections from the eyeglasses in the photograph that obscure the eyes. Dark glasses or non prescription glasses with tinted lenses are not acceptable unless required for medical purposes. The department may require a certificate from the applicant's treating physician to confirm that such items are medically required. The photographs must present a clear, frontal image of the applicant, except as provided below, and include the full face from the bottom of the chin to the top of the head, including hair. The image of the applicant must be between 1 and 1-3/8 inches. Only the applicant may be portrayed. Military personnel under 21 years of age must submit two identical color passport photos of the applicant in profile facing the left shoulder, 2 inches by 2 inches, taken in normal light with a white or off-white background. The photograph must include the bottom of the chin to the top of the head. Photos in which the face of the person being photographed is not in focus will not be accepted.

(4) Two fingerprint cards. The applicant must be fingerprinted by a person appropriately trained in recording fingerprints who is employed by a law enforcement agency or by a private entity designated by a law enforcement agency, as an entity qualified to take fingerprints of an applicant for a license. The applicant must display a Texas driver license or personal identification card issued by the department to the person recording the applicant's fingerprints. If the applicant is a non-resident, the applicant must display a driver license or personal identification card issued by the appropriate agency in the applicant's state of residence. The applicant must deliver two passport photographs as described in paragraph (3) of this section, two blank fingerprint cards supplied by the department, and an instruction page included in the application materials. An individual who is applying for an instructor certificate only is not required to submit photographs. Two complete sets of legible and classifiable fingerprints of the applicant must be recorded on cards provided by the department. The person who records the applicant's fingerprints shall:

(A) verify that the passport photographs are of the person being fingerprinted (not required for instructor applicants);

(B) either complete or verify the accuracy of the non-fingerprint data being submitted on the card;

(C) record the individual's fingerprints on the card, in a manner consistent with that normally done for an arrest fingerprint card, including the simultaneous impressions;

(D) obtain the signature of the applicant on both fingerprint cards and on the back of one of the passport photographs (not required for instructor applicants). The applicant's signature must comply with §15.21 of this title (relating to Signature);

(E) sign the fingerprint card and the back of the same passport photograph signed by the applicant; (not required for instructor applicants); and

(F) return all documents to the applicant to be forwarded to the department.

(5) Signature of applicant. The applicant must sign the passport photograph holder provided by the department. The applicant's signature must comply with §15.21 of this title.

(6) Proof of age. Proof of age may be established by a Texas driver license or personal identification card issued by the department. Non-resident applicants may establish proof of age by providing a copy of their valid driver license or personal identification card issued by the appropriate agency in their resident state. If an applicant cannot show proof of age through a driver license or personal identification card issued by the department, or appropriate state agency in their resident state, the applicant must submit alternative proof of age. The applicant may submit a certified copy of the applicant's birth certificate as prescribed in §15.24 of this title (relating to Identification of Applicants).

(7) Social Security number. An applicant must provide the applicant's Social Security number. This information is required to assist in the administration of laws relating to child support enforcement, as required and authorized by Family Code, §231.302.

(8) Failure to provide information. If an applicant fails to provide all required application materials, or fails to respond to a request by the department for additional information necessary to process the application, the application process will be terminated as set out in §6.13(a) of this title (relating to Application Review and Background Investigation).

§6.13. Application Review and Background Investigation.

(a) Applications must be complete and legible. If an application is not legible or complete, the department will notify the applicant of the deficiency. The applicant will have 90 days from the date of the deficiency notification letter to amend the application. Upon written re-

quest, the department may extend the period to amend the application for one additional 90 day period. After the period to amend has expired, the application process will be terminated. An individual whose application has been terminated under this subsection will be required to submit new application materials and fees to apply for a license in the future.

(b) Time to review application and complete background investigation. The statutory time periods for the department to conduct application reviews and background investigations shall be measured from the date an application was received and complete. An application is not considered to have been received until it is complete.

§6.14. Duplicate License.

A license holder may not possess more than one license to carry a concealed handgun issued by the department. A license holder who requests a duplicate license based on a change of name or address shall destroy the old license promptly upon receipt of the duplicate license.

§6.15. Renewal of License.

(a) Grace period. An expired license may be renewed for up to one year after the expiration date. If the license has been expired for more than one year, the former license holder must submit an original license application to receive a license in the future.

(b) Notice of renewal. Renewal notices will be mailed to license holder no more than six (6) months before the expiration date to the address currently reported to the department by the applicant.

(c) Cost of renewal. The renewal fee for a license will be $70 except as otherwise provided by the Act.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. PROCEDURES ON DENIAL OF LICENSE

37 TAC §6.31, §6.32

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of Chapter 6, §6.31 and §6.32, concerning Procedures on Denial of License. Repeal of the sections is necessary in order to delete redundant information which is already contained in the Act.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the proposal may be submitted to Steve Moninger, Legal Staff, Regulatory Licensing Service, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-0242, (512) 424-5834.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Government Code, §411.197.

Texas Government Code, §411.004(3) and §411.197 are affected by this proposal.

§6.31. Notice of Denial; Grounds.

§6.32. Request for Hearing; Administrative Review of Denial.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. ENFORCEMENT PROCEDURES

37 TAC §§6.51 - 6.54

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of Chapter 6, §§6.51 - 6.54, concerning Enforcement Procedures.

Repeal of the sections is necessary in order to delete redundant information which is already contained in the Act.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the proposal may be submitted to Steve Moninger, Legal Staff, Regulatory Licensing Service, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-0242, (512) 424-5834.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Government Code, §411.197.

Texas Government Code, §411.004(3) and §411.197 are affected by this proposal.

§6.51. Authority of Peace Officer To Disarm.

§6.52. Duties of Peace Officer on Arrest of License Holder.

§6.53. Application of Code of Criminal Procedure to Seized Evidence.

§6.54. Duty of Court on Conviction of License Holder.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Director

Texas Department of Public Safety

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SUBCHAPTER F. SUSPENSION AND REVOCATION PROCEDURES

37 TAC §§6.61 - 6.63

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of Chapter 6, §§6.61 - 6.63, concerning Suspension And Revocation Procedures. Repeal of the sections is necessary in order to delete redundant information which is already contained in the Act.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the proposal may be submitted to Steve Moninger, Legal Staff, Regulatory Licensing Service, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-0242, (512) 424-5834.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Government Code, §411.197.

Texas Government Code, §411.004(3) and §411.197 are affected by this proposal.

§6.61. Suspension of License for Violation of the Act.

§6.62. Family Code Suspension of License.

§6.63. Revocation of License.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER G. CERTIFIED HANDGUN INSTRUCTORS

37 TAC §§6.71 - 6.74, 6.76, 6.77, 6.79 - 6.92

The Texas Department of Public Safety proposes amendments to Chapter 6, §§6.71 - 6.74, 6.76, 6.77, 6.79 - 6.81, and new §§6.82 - 6.92, concerning Certified Handgun Instructors. Amendments to the sections are necessary in order to provide relevant information regarding current requirements. The new sections are filed simultaneously with the repeal of current §§6.82 - 6.96 and are necessary due to several sections having been renumbered and updated in order to conform to current statutory requirements and practices.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the sections as proposed. The anticipated economic costs to individuals who are required to comply with the rules as proposed will be the actual cost of obtaining the original or renewal instructor certification. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to these rules. Accordingly, the Department is not required to complete a takings impact assessment regarding these rules.

Comments on the proposal may be submitted to Steve Moninger, Legal Staff, Regulatory Licensing Service, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-0242, (512) 424-5834.

The amendments and new rules are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Government Code, §411.197.

Texas Government Code, §411.004(3) and §411.197 are affected by this proposal.

*§6.71. Instructor*Application and Background Investigation.*

(a) An instructor applicant is subject to the same [~~a~~] background investigation [~~substantially similar to the background investigation~~] required for license applicants.

(b) An instructor applicant who is not able to attend the course of instruction for which he or she is scheduled may request to be rescheduled for another class. If the instructor applicant fails to attend this second scheduled class, the application will be terminated and the individual will be required to submit a new application in order to attend a course in the future.

§6.72. Instructor Training.

[~~The department shall provide necessary training to eligible instructor applicants.~~] To qualify for certification as a handgun instructor, an instructor applicant must apply for and successfully complete the instructor training course offered by the department. As part of the training course, the [~~The~~] instructor applicant must demonstrate handgun proficiency and must pass a written test covering the required subjects [~~knowledge and ability to instruct persons on all required subjects~~].

§6.73. Equipment.

An instructor applicant must bring the following required equipment to training: one non semi-automatic handgun; one semi-automatic handgun; ammunition; ear protection (over-the-ear) and eye protection; other appropriate protective clothing; and other equipment as determined by the department. Handguns must be at least .32 caliber semi-automatic [~~nine millimeter~~] or .38 caliber non-semi-automatic. No optical enhancers will be allowed.

§6.74. Inspection of Handguns.

Each handgun that is to be used in a training course must be in safe and working condition. No handgun may have any internal modification which compromises the safety of the weapon. Handguns are subject to inspection by the department's instructors prior to training and at any time during the training course. If the instructor finds that a weapon is unsafe, then the instructor will reject the weapon for use in training and qualifications. The instructor may require that any handgun be secured or removed from department premises.

§6.76. Curriculum for Instructor Applicants.

The normal course of instruction for instructor applicants shall be 35-40 [~~40~~] hours in length. The department may offer an abbreviated course for instructor applicants who have prior certification from an approved training program. Training will include instruction on the following subjects:

(1) the laws that relate to weapons and to the use of deadly force;

(2) handgun use, proficiency, and safety;

(3) nonviolent dispute resolution;

(4) proper storage practices for handguns, including storage practices that eliminate the possibility of accidental injury to a child;

(5) techniques of group instruction; and

(6) other subjects deemed necessary and appropriate by the department.

§6.77. Target.

(a) All courses of fire will be scored on a standard B-27 [~~TX-PT~~] target. The B-27 target must be 24 inches by 45 inches and may be one of four colors; black, blue, red, or green [~~The TX-PT is a blue silhouette target developed by the department. No modifications to the target or scoring will be allowed~~].

(b) The target shall be scored utilizing the 5, 4, 3 scoring diagram in the upper left hand corner.

§6.79. Conduct during Training.

(a) Good order and discipline will be maintained during the training course. Conduct which is disruptive or unsafe shall be grounds for immediate ejection from the training course. Unsafe handling of a handgun shall constitute grounds for immediate ejection from the training course.

(b) No instructor applicant or other person present during training shall consume alcohol prior to or during training. Consumption of alcohol or illegal drugs shall constitute grounds for immediate removal from training. No alcohol shall be brought on department premises. No person who is impaired by any substance may be present during training. Instructor applicants who take prescription medication should consult privately with the department's instructor about potential impairment of mental and physical faculties. If good cause exists to believe that any person is impaired during training, then the department's instructor shall remove that person from training.

(c) Removal of an [~~a~~] instructor applicant shall be at the sole discretion of the department's instructor.

§6.80. Failure to Qualify for Certification [~~Reapplication~~].

An instructor applicant who fails to qualify for certification will be given a preference for an opportunity to attend the normal course of instruction within six months.

§6.81. Abbreviated Instructor Training Course.

(a) An instructor applicant may apply for an abbreviated instructor training course which shall be 28 hours in length.

(b) An applicant for the abbreviated instructor training course must provide documentation or credentials in support of one of the following:

(1) that the individual has been certified by the department's Private Security Bureau [~~Texas Board of Private Investigators and Private Security Agencies~~] to instruct others in the use of handguns;

(2) that the individual has been certified by the National Rifle Association of America as a handgun instructor; or

(3) that the individual regularly instructs others in the use of handguns and has graduated from a handgun instructor school that uses a nationally accepted course designed to train persons as handgun instructors.

(c) An applicant for the abbreviated instructor training course may be required to produce course materials related to firearms courses previously attended.

(d) An applicant for the abbreviated instructor training course will be required to take a pretest to demonstrate both handgun knowledge and proficiency. The applicant will be given one opportunity to pass the pretest. To qualify for the abbreviated course, the instructor applicant must achieve the following score:

(1) a minimum score of 70% on written pretest; and

(2) a minimum score of 90% on proficiency with both a semi-automatic and non semi-automatic handgun.

(e) An applicant for the abbreviated instructor training course who fails to qualify on either the written or proficiency pretest for the abbreviated course of instruction will not be permitted to attend the training course, but will be given preference for an opportunity to attend the normal course of instruction within six months.

§6.82. No Authority To Carry.

Certification as an instructor does not authorize a person to carry a concealed handgun.

§6.83. Shooting Range and Classroom Facilities.

(a) All classroom and range instruction for license applicants shall be conducted in this state. All classroom and range instruction facilities are subject to inspection and registration by the department, as provided by this chapter.

(b) A shooting range which is to be used for instruction or proficiency demonstration of license applicants must be registered by the owner with the department as provided by this chapter. By virtue of registration of the range with the department, the range owner consents:

(1) to cooperate with the department in instruction of license applicants;

(2) to permit entry of department personnel onto the range facilities during normal business hours and at any time while instruction of license applicants is being conducted;

(3) to permit inspection of range facilities by department personnel;

(4) to permit monitoring of instruction of license applicants by department personnel; and

(5) to abide by the rules of this chapter.

(c) A range owner may withdraw from registered status by mailing the department 30 days advance written notice. The notice should identify the range owner and range number.

(d) Range instruction and proficiency demonstration must be conducted at a shooting range facility registered with the department. A proficiency certificate must indicate the range on which the proficiency examination was given. If a proficiency examination is conducted at a range not registered with the department, the certificate will be rejected.

(e) To be registered, each range must comply with applicable municipal, state, and federal law. The range must have the capability of shooting at a distance of 15 yards.

(f) No fee is required to register a shooting range with the department. To register a range, the range owner shall report the following information on a form provided by the department:

(1) the owner of the range;

(2) the physical address of the range;

(3) the mailing address of the range owner; and

(4) a notarized Range Certification Affidavit signed by a certified handgun instructor.

(g) Each registered range will be assigned an identification number to facilitate monitoring by the department of instruction of license applicants.

(h) A mobile shooting range may be registered with the department. The range owner must provide the department with a permanent mailing address in this state where the owner agrees to receive correspondence.

§6.84. Prior Notice of Training Required.

For each training session, a certified instructor shall give prior notice to the department of the date, time, classroom location, range location, range number, and one or more certified instructors who are responsible for the training session. Notice required by this section may be faxed to the department, and may include multiple training sessions.

§6.85. Monitoring by the Department.

Department personnel may monitor any class or training of license applicants by a certified handgun instructor. A certified handgun instructor shall cooperate with the department in its monitoring of the training of license applicants.

§6.86. Video and Guest Instruction; Approval.

Video instruction may be used as a component of course instruction only with the prior written approval of the department. Not more than 20% of course instruction may be video instruction. Guest instructors who are not certified may be used for course instruction only with the prior written approval of the department. Request for approval for video or guest instruction shall be submitted on Form TR-97, which is adopted for that purpose, and sent by mail or fax to the Texas Department of Public Safety Pistol Range, Post Office Box 4087, Austin, Texas 78773-0001.

§6.87. Instructor Record Retention.

(a) Records to be retained and available for inspection. A certified handgun instructor shall make available for inspection to the department any and all records maintained by a certified handgun instructor under the Act. A certified handgun instructor shall retain the following:

(1) a record of each proficiency certificate issued by the instructor;

(2) a record of each license applicant who has applied for instruction, whether accepted or rejected for instruction;

(3) post-test scores;

(4) written critiques or notes made by the instructor;

(5) proficiency demonstrations;

(6) course materials; and

(7) copies of reports submitted to the department.

(b) Records must be retained for a period of three years after completion. Records must be stored in a safe and secure place and must be available for inspection by authorized officers of the department.

§6.88. Instructor Reports to the Department.

(a) Report on completion. On completion of a training course by a license applicant, a certified instructor who trained the applicant shall submit a report to the department indicating only whether the applicant passed or failed.

(b) Accidental discharge report. If an accidental discharge occurs during training or proficiency examination, the certified handgun instructor shall submit a report to the department within five business days. An accidental discharge report shall be submitted on Form TR-98.

(c) Time to submit reports. Reports must be submitted within five business days on the most recent version of the forms approved by the department.

§6.89. Proficiency Certificates.

Proficiency certificates will be available for sale by the department to certified instructors for $5.00 each. Proficiency certificates will be sold in lots of ten or more. Proficiency certificates may be ordered on Form CR-91T, which is adopted for that purpose. Proficiency certificates may be awarded by an instructor to a qualified license applicant, but may not otherwise be transferred to another certified instructor or to any other person. Proficiency certificates shall be kept locked and secure at all times to prevent theft. A certified instructor shall report the loss, theft, or destruction of proficiency certificates to the department within five business days.

§6.90. Compliance.

Instructor applicants and certified handgun instructors are required to comply with all applicable municipal ordinances, state and federal statutes, and rules, regulations, policies and operational procedures of the Texas Department of Public Safety and the Texas Department of Public Safety Training Academy. Failure to comply may constitute grounds for removal from training, or denial, suspension, or revocation of instructor certification.

§6.91. Restrictions on Advertising and Promotional Material.

(a) An instructor may not use the State Seal of Texas in advertising or promotional materials. Private use of the State Seal of Texas for advertising or commercial purposes is a violation of Business and Commerce Code, §17.08. Violation is a misdemeanor and a deceptive trade practice as provided by that section.

(b) An instructor may not use the department's name or insignia, or the name of any division of the department, in advertising or promotional materials. Use of the Department name or insignia or Division name is a violation of Texas Government Code, §411.017. Violation is a criminal offense (Class A misdemeanor or third degree felony), as provided by that section.

§6.92. Expiration and Renewal of Instructor Certification.

The certification of a qualified handgun instructor expires on December 31 following the second anniversary after the date of certification. To renew certification, an instructor must pay a fee of $100 and successfully complete the retraining courses required by the department. An instructor whose certificate has expired may renew the certificate up to two years after its expiration. After two years, the instructor must reapply as a new instructor applicant.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200802297
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 424-2135

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37 TAC §§6.82 - 6.96

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of Chapter 6, §§6.82 - 6.96, concerning Certified Handgun Instructors. Repeal of the sections is necessary in order to delete redundant information already contained in the Act or because it does not reflect current practices. This repeal is filed simultaneously with a proposal for new §§6.82 - 6.92 which will promulgate current requirements for Certified Handgun Instructors.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the proposal may be submitted to Steve Moninger, Legal Staff, Regulatory Licensing Service, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-0242, (512) 424-5834.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Government Code, §411.197.

Texas Government Code, §411.004(3) and §411.197 are affected by this proposal.

§6.82. Instructor Certification.

§6.83. No Authority To Carry.

§6.84. Curriculum for License Applicants.

§6.85. Continuing Education.

§6.86. Shooting Range and Classroom Facilities.

§6.87. Prior Notice of Training Required.

§6.88. Monitoring by the Department.

§6.89. Video and Guest Instruction; Approval.

§6.90. Instructor Record Retention.

§6.91. Instructor Reports to the Department.

§6.92. Proficiency Certificates.

§6.93. Compliance.

§6.94. Restrictions on Advertising and Promotional Material.

§6.95. Expiration and Renewal of Instructor Certification.

§6.96. Review of Denial, Suspension, or Revocation of Instructor Certification.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER H. INFORMATION AND REPORTS

37 TAC §§6.111 - 6.116

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of Chapter 6, §§6.111 - 6.116, concerning Information And Reports. Repeal of the sections is necessary in order to delete redundant information which is already contained in the Act.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeals as proposed. There are no anticipated economic costs to individuals who are required to comply with the repeals as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to these repeals. Accordingly, the Department is not required to complete a takings impact assessment regarding these repeals.

Comments on the proposal may be submitted to Steve Moninger, Legal Staff, Regulatory Licensing Service, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-0242, (512) 424-5834.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Government Code, §411.197.

Texas Government Code, §411.004(3) and §411.197 are affected by this proposal.

§6.111. List of Certified Instructors; Training Sessions; Rangers.
§6.112. Statistical Report.
§6.113. Information Concerning Individual License Holder.
§6.114. Confidential Information.
§6.115. Information and Reports Available to Criminal Justice Agencies.
§6.116. Reports by the Department to Law Enforcement Agencies.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 9. PUBLIC SAFETY COMMUNICATIONS

SUBCHAPTER C. AMBER ALERT NETWORK FOR ABDUCTED CHILDREN

37 TAC §9.22

The Texas Department of Public Safety (DPS) proposes amendments to §9.22, concerning the Amber Alert Network For Abducted Children.

Amendment to the section is necessary in order to update the form number needed for requesting an Amber Alert. In addition, amendments to the graphic material contained in §9.22 are necessary in order update the form number and to outline additional information requested from local law enforcement when they request activation of the statewide Amber Alert Network. The graphic material has been revised to include a date of request, a phone number for media inquiries, and a National Crime Information Center Identification Control number for the victim, as well as reorganizing some of the information gathered about the victim and suspect.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Patty Subia, Missing Persons Clearinghouse, Bureau of Information Analysis, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0422; or by electronic mail to patty.subia@txdps.state.tx.us. DPS will accept comments for 30 days after publication in the *Texas Register*. For further information, call Patty Subia at (512) 424-2811.

The amendments are proposed pursuant to Texas Government Code, §411.353(b), which requires the director to adopt rules and issue directives as necessary to ensure proper implementation of the alert system with the rules and directive to include instructions on the procedures for activating and deactivating the alert system; and Texas Government Code, §411.353(c), which requires the director to prescribe forms for use by local law enforcement agencies in requesting activation of the alert system.

Texas Government Code, §411.353 is affected by this proposal.

§9.22. Local Law Enforcement Responsibility.

A local law enforcement agency with jurisdiction over the investigation of an abducted child may submit a request for activation of the Amber Alert Network. The request must be submitted on DPS Form MP-24[~~DEM-35~~]. A local law enforcement agency may submit the form after it has verified that all statutory criteria for activation are clearly established by the specific facts of the case.
Figure: 37 TAC §9.22

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Thomas A. Davis, Jr.
Director
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SUBCHAPTER D. SILVER ALERT NETWORK

37 TAC §9.32

The Texas Department of Public Safety (DPS) proposes amendments to §9.32, concerning the Silver Alert Network.

Amendment to the section is necessary in order to update the form number needed for requesting a Silver Alert. In addition, amendments to the graphic material contained in §9.32 are necessary in order to outline additional information requested from local law enforcement when they request activation of the statewide Silver Alert Network. The graphic material has been revised to include an additional criterion for activation of the Silver Alert. This additional criterion confirms that local law enforcement have conducted an investigation verifying that the senior citizen's disappearance is due to his/her impaired mental condition, and that alternative reasons for the senior citizen's disappearance have been ruled out. The revised form also includes a date of request, a phone number for media inquiries, a National Crime Information Center Identification Control number, and the race of the senior citizen, as well as reorganizing some of the information gathered about the missing senior citizen.

Oscar Ybarra, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be current and updated rules.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Patty Subia, Missing Persons Clearinghouse, Bureau of Information Analysis, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0422; or by electronic mail to patty.subia@txdps.state.tx.us. DPS will accept comments for 30 days after publication in the *Texas Register*. For further information, call Patty Subia at (512) 424-2811.

The amendments are proposed pursuant to Texas Government Code, §411.383(b), which requires the director to adopt rules and issue directives as necessary to ensure proper implementation of the alert system with the rules and directive to include procedures to be used by local law enforcement; a description of the circumstances under which local law enforcement is required to report a missing senior citizen; and the procedures to be sued to notify designated media outlets in Texas.

Texas Government Code, §411.383 is affected by this proposal.

§9.32. Local Law Enforcement Responsibility.

A local law enforcement agency with jurisdiction over the investigation of a missing senior citizen may submit a request for activation of the Silver Alert Network. The request must be submitted on the Silver Alert Request Form MP-25[~~(SA-1)~~]. A local law enforcement agency may submit the form after it has verified that all statutory criteria for activation are clearly established by the specific facts of the case. Local law enforcement shall provide documentation of a diagnosed impaired mental condition with the request for activation.

Figure: 37 TAC §9.32

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 809. CHILD CARE SERVICES

The Texas Workforce Commission (Commission) proposes amendments to the following sections of Chapter 809, relating to Child Care Services:

Subchapter B. General Management, §§809.13, 809.19, and 809.20

The Commission proposes amendments to the following sections of Chapter 809, relating to Child Care Services:

Subchapter C. Eligibility for Child Care Services, §§809.43, 809.44, 809.46, and 809.48

The Commission proposes the following new sections to Chapter 809, relating to Child Care Services:

Subchapter C. Eligibility for Child Care Services, §809.50 and §809.51

The Commission proposes the repeal of the following sections of Chapter 809, relating to Child Care Services:

Subchapter C. Eligibility for Child Care Services, §§809.50 - 809.52

The Commission proposes amendments to the following sections of Chapter 809, relating to Child Care Services:

Subchapter D. Parent Rights and Responsibilities, §809.74 and §809.75

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The Commission proposes to amend Child Care Services rules, Chapter 809, to address:

- a legislatively mandated increase in reimbursement rates for child care providers that obtain Texas School Ready!™ certification (TSRC) or meet the Texas Rising Star Provider criteria;

- child care for a parent's extended temporary medical incapacitation or temporary cessation of work, education, or training; and

- continued eligibility for wraparound child care--i.e., care provided before and after a child care program's designated hours--for children who are receiving Commission-funded child care and are enrolled in Head Start, public prekindergarten (pre-K), or a school-readiness integration program.

The Commission also proposes to make several technical corrections and clarifications to Chapter 809 by:

- changing incorrect citations;

- using common phrases and language throughout the rules; and

- providing clarifying language that aligns the rules with Commission intent and current practice.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER B. GENERAL MANAGEMENT

The Commission proposes the following amendments to Subchapter B:

§809.13. Board Policies for Child Care Services

Section 809.13, relating to Local Workforce Development Board (Board) policies for child care services, requires Boards to:

- conduct fraud fact-finding; and

- establish policies regarding personal responsibility agreement (PRA) sanctions.

Section 809.13(d)(7) changes the reference from §§809.48, 809.50, and 809.51 to §809.48 and §809.50 to reflect the correct provisions setting forth the minimum activity requirements for parents.

Section 809.13(d)(11) changes the reference from §809.71(b)(2) to §809.71(3) to reflect the correct provision for transferring a child from one provider to another.

Section 809.13(d)(13) changes the reference from §809.92(b)(3) to §809.92(b)(4) to reflect the correct provision for attendance standards and procedures.

Section 809.13(d)(15) is amended to clarify that Boards are required to develop procedures for fraud fact-finding--not to investigate fraud-by replacing the term "investigating" with the term "fact-finding" to reflect the language used in §809.111. This change also aligns with current practices and principles from the January 2007 rule amendment, which states that it is the Commission's responsibility-not the Boards' responsibility-to determine if a person has committed fraud, and it is the Boards' role to research facts, not to investigate whether fraud has occurred. This policy is contained in WD Letter 59-06, Change 1, issued February 2, 2007, and entitled "Requirements for Reporting, Fact-Finding, and Prosecution of Fraud, Waste, Theft, and Program Abuse Cases, and Collection of Overpayments: Update."

New §809.13(d)(16) requires Boards to establish policies regarding sanctions imposed when a parent fails to comply with the provisions of the PRA as referenced in §809.76(c). Because a Board has the flexibility to terminate child care when a parent fails to comply with the provisions of the PRA, this sanction policy could affect the provision of workforce services and, therefore, as required by Commission rule §801.51(f) and as detailed in WD Letter 10-07, issued February 2, 2007, and entitled "Adoption of Local Workforce Development Board Policies in Open Meetings," Board members must adopt such policies in an open meeting.

New §809.13(d)(17) requires Boards to establish a policy concerning continued child care for children enrolled in Head Start, Early Head Start, or a public pre-K program as provided in §809.50(g). The decision to allow continued child care for children enrolled in early education programs is left with the Boards based on local workforce needs and circumstances. To facilitate local public input regarding this decision, Board members must adopt such policies in an open meeting as required by Commission rule §801.51(f) and as detailed in WD Letter 10-07.

§809.19. Assessing the Parent Share of Cost

Section 809.19(a)(2)(C) is amended to allow parents who have children receiving protective services child care pursuant to §809.49 and §809.54(c)(1), to be exempt from the parent share of cost--unless the Texas Department of Family and Protective Services (DFPS) authorizes a parent share of cost.

This paragraph clarifies that a parent's exemption from the parent share of cost is applicable when a child's eligibility for child care is determined by DFPS for a child currently or formerly receiving protective services. The exemption from the parent share of cost applies to children receiving DFPS protective services as well as children formerly receiving protective services for whom DFPS has determined that child care is integral to that service need as provided by §809.54(c)(1). The current rule language does not specify that a parent of a child who formerly received protective services is exempt, but it is current practice and the intent of the Commission.

§809.20. Maximum Provider Reimbursement Rates

Section 809.20(b) replaces the term "graduated" reimbursement rates with the term "enhanced" reimbursement rates to describe the minimum five percent increase in rates for certain providers. The term enhanced is intended to mean higher. Enhanced rates may also be graduated, but this is not a requirement. Use of the term enhanced aligns with language used in Article IX, §19.111 of the General Appropriations Act, 80th Texas Legislature, Regular Session (2007), which requires the enhancement of reimbursement rates for child care providers that obtain certification under the TSRC system or meet Texas Rising Star Provider criteria.

New §809.20(b)(3) requires Boards to establish enhanced reimbursement rates for child care providers that obtain certification under the TSRC system. This new paragraph implements the di-

rection of the Texas Legislature as provided in Article IX, §19.111 of the General Appropriations Act, 80th Texas Legislature, Regular Session (2007).

The Commission emphasizes that although Boards must establish enhanced reimbursement rates for infants, toddlers, and preschool children attending a certified Texas School Ready!™ facility, Boards have the flexibility to establish enhanced reimbursement rates for school-age children enrolled in such facilities.

However, an enhanced reimbursement rate must be applied to all age groups and classrooms for Texas Rising Star Providers and child care providers participating in a Texas Early Education Model (TEEM) school readiness integration project developed by the State Center for Early Childhood Development at the University of Texas Health Science Center (State Center). School-age children or other TWC-subsidized children in the TEEM facility are not excluded from the enhanced reimbursement rates.

SUBCHAPTER C. ELIGIBILITY FOR CHILD CARE SERVICES

The Commission proposes the following amendments to Subchapter C:

§809.43. Priority for Child Care Services

Section 809.43(a)(2)(B) clarifies that a child is included in the second priority group if the parent is a qualified veteran "or qualified spouse." The phrase "or qualified spouse" is added to align with the definition in §801.23 of the Commission's Local Workforce Development Boards rules.

§809.44. Calculating Family Income

Section 809.44 clarifies that income sources listed are used for determining both eligibility and parent share of cost. The section also states that family income does not include any income sources specifically excluded by federal law or regulation.

Section 809.44(a) adds the phrase "and the parent share of cost" to make the list of income items also applicable to determining parent share of cost. This change aligns with Boards' longstanding practice of using the income inclusions and exclusions both for determining eligibility and for determining parent share of cost.

New §809.44(b)(11) adds a comprehensive exclusion to cover any income sources specifically excluded by federal law or regulation. Allowing a comprehensive exclusion for family income sources that are specifically excluded by federal law or regulation forgoes the need for a Commission rule change any time federal legislation or regulation is amended to exclude a specific income source from being counted toward eligibility for a federally funded program.

§809.46. Temporary Assistance for Needy Families Applicant Child Care

Section 809.46(c) changes the reference from §§809.50 - 809.52 to §809.50 resulting from the repeal of §§809.50 - 809.52 and the proposal of new §809.50.

Section 809.46(e) changes the reference from §§809.50 - 809.52 to §809.50 resulting from the repeal of §§809.50 - 809.52 and the proposal of new §809.50.

§809.48. Transitional Child Care

Section 809.48 is amended to incorporate the allowable reduction of work and education requirements for At-Risk child care into Transitional child care.

Section 809.48(b) replaces the phrase "children in families at risk of becoming dependent on public assistance" with "At-Risk child care" as set forth in new §809.50.

New §809.48(f) allows a Board to reduce the work, education, and job training activity requirements if a parent's documented medical disability or need to care for a physically or mentally disabled family member prevents the parent from participating in the activities for the required hours per week.

New §809.48(g) specifies the education credit-hour equivalences for meeting the required education activity hours per week, specifically:

- §809.48(g)(1) states that each credit hour of postsecondary education counts as three hours of education activity per week; and

- §809.48(g)(2) states that each credit hour of a condensed postsecondary education course counts as six hours of education activity per week.

§809.50. Child Care for Children Living at Low Incomes

Section 809.50 is repealed and the common provisions of §§809.50 - 809.52 are consolidated into new §809.50, At-Risk Child Care.

§809.51. Child Care for Children with Disabilities

Section 809.51 is repealed and the common provisions of §§809.50 - 809.52 are consolidated into new §809.50, At-Risk Child Care.

§809.52. Child Care for Children of Teen Parents

Section 809.52 is repealed and the common provisions of §§809.50 - 809.52 are consolidated into new §809.50, At-Risk Child Care.

§809.50. At-Risk Child Care

New §809.50 consolidates and streamlines the rule language contained in repealed §§809.50 - 809.52 by combining similar provisions into one section rather than three.

New §809.50 also addresses eligibility for wraparound child care--i.e., child care provided before and after a child care provider's designated hours--for children who are receiving Commission-funded child care and enrolled in Head Start, public pre-K, or a school-readiness integration program.

Regarding wraparound child care for children receiving Commission-funded child care and who are enrolled in Head Start, which includes Early Head Start or public pre-K, the Texas Legislature--as provided in Texas Human Resources Code §72.003, Texas Government Code §2308.3165, and Texas Education Code, Chapter 29--has placed increased emphasis on local coordination among early childhood education programs in order to support integration across these programs. The continued provision of child care services assists in the extension of early childhood education program hours to full day and full year.

However, the varying eligibility periods among Commission-funded child care services, Head Start, and public pre-K have been identified as barriers that may prevent a child in Commission-funded child care from completing a Head Start or public pre-K program during the school year. Head Start and public pre-K eligibility are determined prior to the school or program year. Children are deemed eligible to remain in these programs regardless of changes in a family's work or income status. However, children in Commission-funded child care who

are receiving wraparound care while enrolled in a Head Start or public pre-K program lose eligibility for Commission-funded child care during the school year when a family's income or work hours change. These early education programs have identified the Child Care and Development Fund (CCDF) eligibility period as a barrier to a child's ability to continue participating in the early education program.

The Commission proposes this amendment with the intent of removing this barrier and to further the intent of the Texas Legislature in Texas Human Resources Code §72.003, Texas Government Code §2308.3165, and Texas Education Code, Chapter 29.

New §809.50(a) establishes the eligibility requirements for At-Risk child care. Section 809.50(a)(1) sets income limits--as established by the Board, and §809.50(a)(2) sets forth the work, education, and job training requirements for a parent to be determined eligible for child care.

New §809.50(b) allows Boards to reduce the work, education, and job training activity requirements if a parent's documented medical disability or need to care for a physically or mentally disabled family member prevents the parent from participating in the activities for the required hours per week.

New §809.50(c) specifies the education credit hour equivalences for meeting the required education activity hours per week and states that teen parents attending high school or the equivalent shall be considered as meeting the education requirements.

New §809.50(d) states that when calculating income eligibility for a child with disabilities, a Board must deduct the cost of the child's ongoing medical expenses from the family income.

New §809.50(e) allows Boards to establish a higher income eligibility limit for teen parents than those specified in §809.41(a)(2)(A).

New §809.50(f) states that a teen parent's income is based solely on the teen parent's income and size of the teen's family as defined in §809.2(8).

New §809.50(g) states that a child receiving child care services under the Board's initial eligibility requirements in §809.41(a)(2)(A) who is enrolled in Head Start, Early Head Start, or public pre-K is eligible to continue receiving child care until the end of the school year as long as:

- the family's income does not exceed 85% of the state median income (SMI) for a family of the same size;

- child care is required for the parent to work or attend a job training or educational program for a minimum of 25 hours per week for a single-parent family or 50 hours per week for a two-parent family; and

- the parents continue to comply with the parent responsibilities described in Subchapter D.

Allowing child care to continue for a child enrolled in Head Start, Early Head Start, or public pre-K assists in the availability of full-day child care pursuant to §809.14(b). The continuation of child care under these provisions is allowed on the basis of the child meeting the federal requirements described in §809.42(c)(2) as long as the parent is able to meet the Board's initial eligibility requirements. With the federal requirements establishing the eligibility income limit at 85% SMI, this rule only affects Boards whose initial income limits are below 85% SMI and whose work requirements are set higher than those set forth in §809.50(a)(2).

§809.51. Child Care during Temporary Interruptions in Work, Education, or Training

New §809.51 addresses child care during a parent's:

- extended temporary medical incapacitation; and

- temporary cessation of work, education, or job training activities.

Extended temporary medical incapacitation and temporary cessation of work, education, or training are not addressed in current rules. In both circumstances, a parent remains employed, in school, or in training but is temporarily unable to meet the weekly work or attendance hour requirements, thereby causing the parent to become ineligible for child care.

New §809.51(a) applies to the temporary cessation of work, education, or job training activities. This situation may occur when an individual remains employed but is temporarily not working, such as with public school employees and students who may no longer be meeting the hourly work, education, or job training requirements during semester or summer breaks. Section 809.51(a) states that if a parent has a temporary cessation of work, education, or job training activities and is unable to meet the requirements described in §809.50(a)(2), child care may be suspended for no more than 90 calendar days from the documented effective date of the cessation of these activities. During the suspension of child care based on the temporary cessation of work, the parent will not be receiving subsidized child care, but the parent will also not be required to reapply for child care services or be subject to the child care waiting list when they return to their work, education or job training activities pursuant to their work and attendance hour requirements described in §809.50(a)(2).

New §809.51(b) applies to temporary medical incapacitation. This situation may result from a health impairment that necessitates an employed parent, or a parent in education or job training, to have an extended temporary cessation or reduction in work or attendance hours causing them to be unable to meet the requirements described in §809.50(a)(2). The parent remains employed, in school or in training, but cannot work, attend school or training for an extended period of time, though the parent intends to return to their employment, education or job training following their temporary incapacitation. Section 809.51(b) states that if a parent has a documented temporary medical incapacitation and is unable to meet the work, education, or job training requirements described in §809.50(a)(2), the following shall apply:

- Child care may be allowed to continue for no more than 30 calendar days from the documented effective date of the temporary medical incapacitation; and

- Child care may be suspended for no more than 60 calendar days after the end of the 30-day calendar period following the documented temporary medical incapacitation.

The following new provisions apply to both the temporary cessation of work, education, or job training activities and medical incapacitation:

New §809.51(c) states that upon the parent's return to work, education, or job training activities, a Board is not required to resume child care at the same provider used prior to the documented temporary cessation of these activities or medical incapacitation. The Commission believes that requiring the provider to hold the slot open for the child places an undue financial burden on the

child care provider. Additionally, the parent is not required to reapply for child care services or return to the child care wait list.

New §809.51(d) states that prior to any suspension of child care a parent must provide documentation from the employer, educational institution, or training provider stating that the parent will be returning to work, education, or job training activities following the temporary cessation of these activities or medical incapacitation. Even if a parent becomes incapacitated because of a sudden illness or medical emergency, the 30-day maximum period where child care services may continue allows the parent adequate time to provide the documentation. The Board may determine what is considered acceptable documentation which for example could include registration documents or a signed note from the school indicating that the parent will be returning after the break.

SUBCHAPTER D. PARENT RIGHTS AND RESPONSIBILITIES

The Commission proposes the following amendments to Subchapter D:

§809.74. Parent Appeal Rights

Section 809.74(a) is amended to include Choices caseworkers and FSE&T caseworkers and to add the suspension of child care as an action for which a parent has the right to request a hearing pursuant to Chapter 823 of the Commission's rules. The Commission believes the suspension of care as described under new §809.51 is an adverse action, pursuant to §823.2(2), similar to the currently appealable denial, delay, termination or reduction in child care services and, therefore, it is eligible for appeal by the parent. However, as described in the following section--§809.75(b)--child care must not continue during the appeal.

Sections 809.74(d) and (e) are removed because the information is contained in §809.74(a).

§809.75. Child Care during Appeal

Section 809.75(b)(7) removes the term "parent fees" and replaces it with the term "parent share of cost" to align with terminology used throughout this chapter.

New §809.75(b)(9) states that child care shall not continue during the appeal if the appeal is due to the suspension of child care services pursuant to §809.51 (related to Child Care during Temporary Interruptions in Work, Education, or Training). If for example the Board's child care contractor determines that the length of the suspension period for temporary work cessation or medical incapacitation should be 30 days rather than the maximum allowable 60 or 90 days, parents may appeal the length of the suspension period. However, because child care services will be suspended for only a limited amount of time with the understanding that services will continue following the brief suspension period, allowing child care to continue during any appeal would essentially nullify the suspension period.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and local governments expected as a result of enforcing or administering the rules.

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to persons required to comply with the rules.

There is no anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering the rules.

Economic Impact Statement and Regulatory Flexibility Analysis

The Agency has determined that the proposed rules will not have an adverse economic impact on small businesses as these proposed rules place no requirements on small businesses, including child care providers.

Mark Hughes, Director of Labor Market Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Laurence M. Jones, Director, Workforce Development Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be to:

- meet the requirements of the 80th Texas Legislature regarding enhanced reimbursement rates for child care providers;

- allow greater flexibility for Boards to design child care services to meet the needs of the local workforce development area; and

- allow greater flexibility for parents to continue receiving child care services.

The Agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, the Commission sought the involvement of Texas' 28 Boards. The Commission provided the concept paper regarding these rule amendments to the Boards for consideration and review on December 18, 2007. The Commission also conducted a conference call with Board executive directors and Board staff on January 4, 2008, to discuss the concept paper. During the rulemaking process, the Commission considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register*.

SUBCHAPTER B. GENERAL MANAGEMENT

40 TAC §§809.13, 809.19, 809.20

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed rules will affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.13. Board Policies for Child Care Services.

(a) A Board shall develop, adopt, and modify its policies for the design and management of the delivery of child care services in a public process in accordance with Chapter 801 of this title.

(b) A Board shall maintain written copies of the policies that are required by federal and state law, or as requested by the Commission, and make such policies available to the Commission and the public upon request.

(c) A Board shall also submit any modifications, amendments, or new policies to the Commission no later than two weeks after adoption of the policy by the Board.

(d) At a minimum, a Board shall develop policies related to:

(1) how the Board determines that the parent is making progress toward successful completion of a job training or educational program as described in §809.2(1);

(2) maintenance of a waiting list as described in §809.18(b);

(3) assessment of a parent share of cost as described in §809.19, including the reimbursement of providers when a parent fails to pay the parent share of cost;

(4) maximum reimbursement rates as provided in §809.20, including policies related to reimbursement of providers that [~~who~~] offer transportation;

(5) family income limits as described in Subchapter C of this chapter (relating to Eligibility for Child Care Services);

(6) provision of child care services to a child with disabilities up to the age of 19 as described in §809.41(a)(1)(B);

(7) minimum activity requirements for parents as described in §809.48 and §809.50 [~~§§809.48, 809.50, and 809.51~~];

(8) time limits for the provision of child care while the parent is attending an educational program as described in §809.41(b);

(9) frequency of eligibility redetermination as described in §809.42(b)(2);

(10) Board priority groups as described in §809.43(a);

(11) transfer of a child from one provider to another as described in §809.71(3) [~~§809.71(b)(2)~~];

(12) provider eligibility for listed family homes as provided in §809.91(b), if the Board chooses to include listed family homes as eligible providers;

(13) attendance standards and procedures as provided in §809.92(b)(4) [~~§809.92(b)(3)~~], including provisions consistent with §809.54(f) (relating to Continuity of Care for custody and visitation arrangements);

(14) providers charging the difference between their published rate and the Board's reimbursement rate as provided in §809.92(d); [~~and~~]

(15) procedures for [~~investigating~~] fraud fact-finding as provided in §809.111;[~~.~~]

(16) procedures for imposing sanctions when a parent fails to comply with the provisions of the parent responsibility agreement (PRA) as described in §809.76(c); and

(17) continued child care for children enrolled in Head Start, Early Head Start, or a public pre-kindergarten program pursuant to §809.50(g).

§809.19. Assessing the Parent Share of Cost.

(a) For child care funds allocated by the Commission pursuant to its allocation rules (generally, Chapter 800, General Administration, Subchapter B, Allocation and Funding, and specifically, §800.58, Child Care), including local public transferred funds and local private donated funds, as provided in §809.17, the following shall apply.

(1) A Board shall set a parent share of cost policy that assesses the parent share of cost in a manner that results in the parent share of cost:

(A) being assessed to all parents, except in instances when an exemption under paragraph (2) of this subsection applies;

(B) being an amount determined by a sliding fee scale based on the family's size and gross monthly income, and also may consider the number of children in care; and

(C) not exceeding the cost of care.

(2) Parents who are one or more of the following are exempt from paying the parent share of cost:

(A) Parents who are participating in Choices;

(B) Parents who are participating in FSE&T services; or

(C) Parents who have children who are receiving protective services child care pursuant to §809.49 and §809.54(c)(1), unless DFPS assesses the parent share of cost.

(3) Teen parents who are not covered under exemptions listed in paragraph (2) of this subsection shall be assessed a parent share of cost. The teen parent's share of cost is based solely on the teen parent's income and size of the teen's family as defined in §809.2(8).

(b) For child care services funded from sources other than those specified in subsection (a) of this section, a Board shall set a parent share of cost policy based on a sliding fee scale. The sliding fee scale may be the same as or different from the provisions contained in subsection (a) of this section.

(c) A Board shall establish a policy regarding reimbursement of providers when parents fail to pay the parent share of cost.

(d) The Board or its child care contractor may review the assessed parent share of cost for possible reduction if there are extenuating circumstances that jeopardize a family's self-sufficiency. The Board or its child care contractor may reduce the assessed parent share of cost if warranted by these circumstances.

(e) If the parent is not covered by an exemption as specified in subsection (a)(2) of this section, then the Board or its child care contractor shall not waive the assessed parent share of cost under any circumstances.

(f) If the parent share of cost, based on family income and family size, is calculated to be zero, then the Board or its child care contractor shall not charge the parent a minimum share of cost amount.

§809.20. Maximum Provider Reimbursement Rates.

(a) Based on local factors, including a market rate survey provided by the Commission, a Board shall establish maximum reimbursement rates for child care subsidies to ensure that the rates provide equal access to child care in the local market and in a manner consistent with state and federal statutes and regulations governing child care.

(b) A Board shall establish enhanced [~~graduated~~] reimbursement rates for:

(1) child care providers participating in integrated school readiness models developed by the State Center; [~~and~~]

(2) Texas Rising Star Providers pursuant to Texas Government Code §2308.315; and[~~.~~]

(3) child care providers that obtain Texas School Ready!™ certification pursuant to Texas Education Code §29.161.

(c) The minimum reimbursement rates established under subsection (b) of this section shall be at least five percent greater than the maximum rate established for providers not meeting the requirements of subsection (b) of this section for the same category of care up to, but not to exceed, the provider's published rate.

(d) A Board or its child care contractor shall ensure that providers that [~~who~~] are reimbursed for additional staff or equipment needed to assist in the care of a child with disabilities are paid a rate up to 190% of the provider's reimbursement rate for a child of that same age. The higher rate shall take into consideration the estimated cost of the additional staff needed by a child with disabilities. The Board shall ensure that a professional, who is familiar with assessing the needs of children with disabilities, certifies the need for the higher reimbursement rate described in subsection (b) of this section.

(e) The Board shall determine whether to reimburse providers that [~~who~~] offer transportation as long as the combined total of the provider's published rate, plus the transportation rate, is subject to the maximum reimbursement rate established in subsection (a) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 29, 2008.

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Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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SUBCHAPTER C. ELIGIBILITY FOR CHILD CARE SERVICES

40 TAC §§809.43, 809.44, 809.46, 809.48, 809.50, 809.51

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed rules will affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.43. Priority for Child Care Services.

(a) A Board shall ensure that child care services are prioritized among the following three priority groups:

(1) The first priority group is assured child care services and includes children of parents eligible for the following:

(A) Choices child care as referenced in §809.45;

(B) Temporary Assistance for Needy Families (TANF) Applicant child care as referenced in §809.46;

(C) FSE&T child care as referenced in §809.47; and

(D) Transitional child care as referenced in §809.48.

(2) The second priority group is served subject to the availability of funds and includes, in the order of priority:

(A) children who need to receive protective services child care as referenced in §809.49;

(B) children of a qualified veteran or qualified spouse as defined in §801.23 of this title;

(C) children of a foster youth as defined in §801.23 of this title;

(D) children of teen parents as defined in §809.2; and

(E) children with disabilities as defined in §809.2.

(3) The third priority group includes any other priority adopted by the Board.

(b) A Board shall not establish a priority group under subsection (a)(3) of this section based on the parent's choice of an individual provider or provider type.

§809.44. Calculating Family Income.

(a) Unless otherwise required by federal or state law, the family income for purposes of determining eligibility and the parent share of cost means the monthly total of the following items for each member of the family (as defined in §809.2(8)):

(1) Total gross earnings. These earnings include wages, salaries, commissions, tips, piece-rate payments, and cash bonuses earned.

(2) Net income from self-employment. Net income includes gross receipts minus business-related expenses from a person's own business, professional enterprise, or partnership, which result in the person's net income. Net income also includes gross receipts minus operating expenses from the operation of a farm.

(3) Pensions, annuities, life insurance, and retirement income. This includes Social Security pensions, veteran's pensions and survivor's benefits and any cash benefit paid to retirees or their survivors by a former employer, or by a union, either directly or through an insurance company. This also includes payments from annuities and life insurance.

(4) Taxable capital gains, dividends, and interest. These earnings include capital gains from the sale of property and earnings from dividends from stock holdings, and interest on savings or bonds.

(5) Rental income. This includes net income from rental of a house, homestead, store, or other property, or rental income from boarders or lodgers.

(6) Public assistance payments. These payments include TANF as authorized under Chapters 31 or 34 of the Texas Human Resources Code, refugee assistance, Social Security Disability Insurance,

Supplemental Security Income, and general assistance (such as cash payments from a county or city).

(7) Income from estate and trust funds. These payments include income from estates, trust funds, inheritances, or royalties.

(8) Unemployment compensation. This includes unemployment payments from governmental unemployment insurance agencies or private companies and strike benefits while a person is unemployed or on strike.

(9) Workers' compensation income, death benefit payments and other disability payments. These payments include compensation received periodically from private or public sources for on-the-job injuries.

(10) Spousal maintenance or alimony. This includes any payment made to a spouse or former spouse under a separation or divorce agreement.

(11) Child support. These payments include court-ordered child support, any maintenance or allowance used for current living costs provided by parents to a minor child who is a student, or any informal child support cash payments made by an absent parent for the maintenance of a minor.

(12) Court settlements or judgments. This includes awards for exemplary or punitive damages, noneconomic damages, and compensation for lost wages or profits, if the court settlement or judgment clearly allocates damages among these categories.

(b) Income to the family that is not included in subsection (a) of this section is excluded in determining the total family income. Specifically, family income does not include:

(1) Food stamps;

(2) Monthly monetary allowances provided to or for children of Vietnam veterans born with certain birth defects;

(3) Educational scholarships, grants, and loans;

(4) Earned Income Tax Credit (EITC) and the Advanced EITC;

(5) Individual Development Account (IDA) withdrawals;

(6) Tax refunds;

(7) VISTA and AmeriCorps living allowances and stipends;

(8) Noncash or in-kind benefits received in lieu of wages;

(9) Foster care payments; [~~and~~]

(10) Special military pay or allowances, which include subsistence allowances, housing allowances, family separation allowances, or special allowances for duty subject to hostile fire or imminent danger; and[~~.~~]

(11) Any income sources specifically excluded by federal law or regulation.

§809.46. Temporary Assistance for Needy Families Applicant Child Care.

(a) A parent is eligible for TANF Applicant child care if the parent:

(1) receives a referral from the Health and Human Services Commission (HHSC) to attend a Workforce Orientation for Applicants (WOA);

(2) locates employment or has increased earnings prior to TANF certification; and

(3) needs child care to accept or retain employment.

(b) To receive TANF Applicant child care, the parent shall be working and not have voluntarily terminated paid employment of at least 25 hours a week within 30 days prior to receiving the referral from HHSC to attend a WOA, unless the voluntary termination was for good cause connected with the parent's work.

(c) Subject to the availability of funds and the continued employment of the parent, TANF Applicant child care shall be provided for up to 12 months or until the family reaches the Board's income limit for eligibility under any provision contained in §809.50 [~~§§809.50 - 809.52~~], whichever occurs first.

(d) Parents who are employed fewer than 25 hours a week at the time they apply for temporary cash assistance are limited to 90 days of TANF Applicant child care. Applicant child care may be extended to a total of 12 months, inclusive of the 90 days, if before the end of the 90-day period, the applicant increases the hours of employment to a minimum of 25 hours a week.

(e) Subject to the availability of funds, a parent whose time limit for TANF Applicant child care has expired may continue to be eligible for child care services provided the parent and child are otherwise eligible under any provision contained in §809.50 [~~§§809.50 - 809.52~~].

§809.48. Transitional Child Care.

(a) A parent is eligible for Transitional child care services if the parent:

(1) has been denied TANF because of increased earnings; or

(2) has been denied temporary cash assistance within 30 days because of expiration of TANF time limits; and

(3) requires child care to work or attend a job training or educational program for a combination of at least 25 hours per week for a single-parent family or 50 hours per week for a two-parent family, or a higher number of hours per week as established by a Board.

(b) Boards may establish an income eligibility limit for Transitional child care that is higher than the eligibility limit for At-Risk child care, pursuant to §809.50 [~~children in families at risk of becoming dependent on public assistance~~], provided that the higher income limit does not exceed 85% of the state median income for a family of the same size.

(c) Transitional child care shall be available for:

(1) a period of up to 12 months from the effective date of the TANF denial; or

(2) a period of up to 18 months from the effective date of the TANF denial in the case of a former TANF recipient who was eligible for child caretaker exemptions pursuant to Texas Human Resources Code §31.012(c) and voluntarily participates in the Choices program.

(d) Former TANF recipients who are not employed when TANF expires, including recipients who are engaged in a Choices activity except as provided under subsection (e) of this section, shall receive up to four weeks of Transitional child care in order to allow these individuals to search for work as needed.

(e) Former TANF recipients who are engaged in a Choices activity, are meeting the requirements of Chapter 811 of this title, and are denied TANF because of receipt of child support shall be eligible to receive Transitional child care services until the date on which the individual completes the activity, as defined by the Board.

(f) A Board may allow a reduction to the requirement in subsection (a)(3) of this section if a parent's documented medical disability or need to care for a physically or mentally disabled family member prevents the parent from participating in work, education, or job training activities for the required hours per week.

(g) For purposes of meeting the education requirements stipulated in subsection (a)(3) of this section, the following shall apply:

(1) each credit hour of postsecondary education counts as three hours of education activity per week; and

(2) each credit hour of a condensed postsecondary education course counts as six education activity hours per week.

§809.50. At-Risk Child Care.

(a) A parent is eligible for child care services under this section if:

(1) the family income does not exceed the income limit established by the Board pursuant to §809.41(a)(2)(A); and

(2) child care is required for the parent to work or attend a job training or educational program for a minimum of 25 hours per week for a single-parent family or 50 hours per week for a two-parent family, or a higher number of hours per week as established by the Board.

(b) A Board may allow a reduction to the work, education, or job training activity requirements in subsection (a)(2) of this section if a parent's documented medical disability or need to care for a physically or mentally disabled family member prevents the parent from participating in these activities for the required hours per week.

(c) For purposes of meeting the education requirements stipulated in subsection (a)(2) of this section, the following shall apply:

(1) each credit hour of postsecondary education counts as three hours of education activity per week;

(2) each credit hour of a condensed postsecondary education course counts as six education activity hours per week; and

(3) teen parents attending high school or the equivalent shall be considered as meeting the education requirements in subsection (a)(2) of this section.

(d) When calculating income eligibility for a child with disabilities, a Board shall deduct the cost of the child's ongoing medical expenses from the family income.

(e) Boards may establish a higher income eligibility limit for teen parents than the eligibility limit established pursuant to §809.41(a)(2)(A) provided that the higher income limit does not exceed 85% of the state median income for a family of the same size.

(f) A teen parent's family income is based solely on the teen parent's income and size of the teen's family as defined in §809.2(8).

(g) To assist in the availability of full-day child care as referenced in §809.14(b), a child receiving child care services under the Board's initial eligibility requirements pursuant to §809.41(a)(2)(A) who is enrolled in Head Start, Early Head Start, or public pre-K may remain eligible to continue receiving child care services until the end of the program's enrollment period as long as:

(1) the family's income does not exceed 85% of the state median income for a family of the same size;

(2) child care is required for the parent to work or attend a job training or educational program for a minimum of 25 hours per week for a single-parent family or 50 hours per week for a two-parent family; and

(3) the parents continue to meet the requirements of Subchapter D (regarding Parent Rights and Responsibilities).

§809.51. Child Care during Temporary Interruptions in Work, Education, or Job Training.

(a) If a parent has a temporary cessation of work, education, or job training activities and is unable to meet the requirements described in §809.50(a)(2), child care may be suspended for no more than 90 calendar days from the documented effective date of the cessation of these activities.

(b) If a parent has a documented temporary medical incapacitation and is unable to meet the work, education, or job training requirements described in §809.50(a)(2), the following shall apply:

(1) Child care may be allowed to continue for no more than 30 calendar days from the documented effective date of the temporary medical incapacitation; and

(2) Child care may be suspended for no more than 60 calendar days after the end of the 30-day calendar period following the documented temporary medical incapacitation, as described in subsection (b)(1) of this section.

(c) Upon the parent's return to work, education, or job training activities, a Board is not required to resume child care at the same provider used prior to the documented temporary cessation of these activities or medical incapacitation.

(d) Prior to any suspension of child care as described in this section, a parent must provide documentation from the employer, educational institution, or training provider stating that the parent will be returning to work, school, or job training activities following the temporary cessation of these activities or medical incapacitation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Reagan Miller
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Texas Workforce Commission
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For further information, please call: (512) 475-0829

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40 TAC §§809.50 - 809.52

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed repeals will affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.50. Child Care for Children Living at Low Incomes.

§809.51. Child Care for Children with Disabilities.

§809.52. Child Care for Children of Teen Parents.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER D. PARENT RIGHTS AND RESPONSIBILITIES

40 TAC §809.74, §809.75

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed rules will affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.74. Parent Appeal Rights.

(a) Unless otherwise stated in this section, a parent may request a hearing pursuant to Chapter 823 of this title, if the parent's eligibility or child's enrollment is denied, delayed, reduced, suspended, or terminated by the Board's child care contractor, Choices caseworker, or FSE&T caseworker.

(b) A parent may have an individual represent him or her during this process.

(c) A parent of a child in protective services may not appeal pursuant to Chapter 823 of this title, but shall follow the procedures established by DFPS.

~~[(d) If the parent's eligibility or child's enrollment is denied, delayed, reduced, or terminated by a Choices caseworker, the parent may appeal pursuant to Chapter 823 of this title.]~~

~~[(e) If the parent's eligibility or child's enrollment is denied, delayed, reduced, or terminated by an FSE&T caseworker, the parent may appeal pursuant to Chapter 823 of this title.]~~

§809.75. Child Care during Appeal.

(a) For a child currently enrolled in child care, a Board shall ensure that child care services continue during the appeal process until a decision is reached, if the parent requests a hearing.

(b) A Board shall ensure that child care does not continue during the appeal process if the parent's eligibility or child's enrollment is denied, delayed, reduced, suspended, or terminated because of:

(1) excessive absences;

(2) voluntary withdrawal from child care;

(3) change in federal or state laws or regulations that affect the parent's eligibility;

(4) lack of funding because of increases in the number of enrolled children in state and Board priority groups;

(5) a sanctions finding against the parent participating in the Choices program;

(6) voluntary withdrawal of a parent from the Choices program;

(7) nonpayment of parent share of cost [~~fees~~]; [~~or~~]

(8) a parent's failure to report, within 10 days of occurrence, any change in the family's circumstances that would have rendered the family ineligible for subsidized child care; or[~~.~~]

(9) a suspension of child care services pursuant to §809.51 (related to Child Care during Temporary Interruptions in Work, Education, or Training).

(c) The cost of providing services during the appeal process is subject to recovery from the parent by the Board, if the appeal decision is rendered against the parent.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 815. UNEMPLOYMENT INSURANCE

The Texas Workforce Commission (Commission) proposes amendments to the following section of Chapter 815, relating to Unemployment Insurance:

Subchapter B. Benefits, Claims and Appeals, §815.18

The Commission proposes the following new subchapter to Chapter 815 relating to Unemployment Insurance:

Subchapter E. Confidentiality and Disclosure of State Unemployment Compensation Information, §§815.161 - 815.168

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed Chapter 815 rules change is to:

- comply with final rules setting forth the statutory confidentiality and disclosure requirements of Title III of the Social Security Act (SSA) and the Federal Unemployment Tax Act (FUTA) concerning unemployment compensation (UC) information issued by the U.S. Department of Labor (DOL) on September 27, 2006, in 20 Code of Federal Regulations (C.F.R.) Part 603; and

- implement House Bill (HB) 2120 and Senate Bill (SB) 1619, enacted by the 80th Texas Legislature, Regular Session (2007),

which address certain federal requirements, as enumerated in 20 C.F.R. Part 603.

The federal rules relating to confidentiality of UC information require state law to:

- contain provisions that are interpreted and applied consistent with federal definitions of "identifying information";

- provide penalties for disclosure of confidential UC information; and

- define "public domain information" to clarify how such information is held in Texas.

By amending Texas Labor Code §301.081 and adding new §301.085, HB 2120 and SB 1619:

- mirror the federal interpretation of identifying information under 20 C.F.R. §603.4;

- make unauthorized disclosure of such information a Class A misdemeanor; and

- establish that UC information is not public information for purposes of Chapter 552, Texas Government Code, thereby making UC information not subject to the Texas Public Information Act.

Federal regulations authorize states to implement specific details and to adopt state law with more stringent confidentiality provisions than those imposed by the final regulations. HB 2120 and SB 1619 direct the Commission to adopt rules regarding confidentiality of UC information.

The federal regulations generally provide that all employment and/or wage information is confidential and must not be disclosed. However, because sharing UC information is necessary for the proper administration of the UC program, disclosure to certain entities has been deemed mandatory. These entities include claimants and employers, the Internal Revenue Service (for purposes of UC tax administration), and U.S. Citizenship and Immigration Services (for purposes of identifying a claimant's immigration status). In addition, federal UC law also requires disclosure of state UC information to certain federal UC and benefits programs. SSA also requires disclosure of specific information to various specified state and federal agencies in administration of the agencies' programs. The confidentiality and disclosure requirements in SSA Title III relating to UC information are conditions for receipt of grants by the states for UC administration. The disclosure requirements in FUTA are conditions required of a state in order for employers in that state to receive credit against the federal unemployment tax under 26 United States Code §3302.

There are certain circumstances under which otherwise confidential UC information can be disclosed, but only if such disclosure is authorized by state law and does not interfere with the efficient administration of the state's UC program. Federal regulations specifically provide that the confidentiality requirement of 20 C.F.R. §603.4 does not apply to public domain information as that term is defined at §603.2(c). The federal regulations allow for disclosure of UC information only if state law provides sufficient protections regarding the payment of costs, safeguards, and data-sharing agreements. For example, provided sufficient protections are in place, states are permitted to disclose UC information:

- to public officials in the performance of their duties;

- to agents or contractors of public officials; or

- on the basis of informed consent.

Notwithstanding the general rule that all UC information is confidential and barred from disclosure, federal regulations make disclosure mandatory to a number of entities--primarily governmental--beyond the obvious claimants and employers, because it is either necessary for the proper administration of the UC program or SSA mandates that certain specified information be disclosed to these other entities. Beyond these mandatory disclosures, states have significant latitude above the federal floor and may have more stringent confidentiality provisions than imposed by federal regulations.

Several factors are key in weighing options related to disclosure of this information. As DOL notes in the regulations' preamble, "Confidentiality is necessary to avoid deterring individuals from claiming benefits or exercising their rights, to encourage employers to provide information necessary for program operations, to avoid interference with the administration of the UC program, and to avoid notoriety for the program if program information were misused."

Historically, the Agency's practices have provided the greatest level of confidentiality to UC information in order to ensure a fair system in which all parties are willing and able to participate. Retaining policies that reflect this conservative approach ensures consistency with federal regulations. Without reasonable and effective confidentiality of this information, a chilling effect may result at all stages of UC proceedings if participants believe the Agency cannot effectively maintain as confidential the often highly personal information divulged. Accordingly, maintaining the status quo retains the guiding principles of federal law, including treating all appeals records as confidential.

Another increasingly important factor in deciding how to treat confidential UC information is the potential for identity theft and the considerable harm (financial and otherwise) the release of such information could cause UC program participants. In deciding what type of UC information to release, the Commission has weighed these benefits and risks, including:

- public access to open administrative hearings and related information;

- chilling effect on individuals and employers exercising appeal rights under UC law;

- staff time and costs necessary to redact the requested records given the broad definition of "identifying information";

- significant risk of inadvertent errors in redaction; and

- potential for identity theft if UC records are released.

In recognition of these factors, and consistent with current practices, the Commission has determined that only UC information considered public domain or otherwise expressly exempted may be released.

Public domain information is generally considered exempt from the UC confidentiality requirements. The final federal rules offer states some flexibility in defining the term public domain information. According to the federal regulations, public domain information includes:

- information about the organization of the state, the state UC Agency, and appellate authorities, including the names and positions of officials and employees;

- information about the state UC law (and applicable federal law), provisions, rules, regulations, and interpretations thereof, includ-

ing statements of general policy and interpretations of general applicability; and

- any agreement, including interstate arrangements and reciprocal agreements and any agreements with DOL related to the administration of the state UC law.

In the proposed federal rules, the possibility existed that appellate records and decisions could qualify as "statements of general policy" within the definition of public domain information set out in 20 C.F.R. §603.2. The Commission commented on these proposed federal rules, concerned that DOL would interpret these regulations to require a state to treat entire appeals records and decisions as public domain information. Such a practice would be at odds with current policy. The Commission determines certain cases to be of precedential value and includes a digest of each selected case in the Commission Appeals Policy and Precedent Manual. Thereafter, only the de-identified digests of Commission-approved precedents are treated as public domain information, while appeals records and fact-specific decisions are withheld. These digests have traditionally been available to the public and may be accessed on the Agency's Web site at www.texasworkforce.org.

In 20 C.F.R. §603.2, DOL removed appeals records and decisions from the definition of public domain information, establishing that the public does not necessarily have a right of access to appeals records and decisions, and ensuring that some appeals information such as Social Security numbers remains confidential. In fact, DOL noted in its preamble to the final rules that, "States may keep appellate records confidential even though the rule does not require it." As a result, the Commission has opted to deem entire appellate records as confidential and will continue to release de-identified digests of Commission-approved precedents.

This practice is supported by provisions of the Texas Government Code and rulings by the Texas Office of the Attorney General (OAG). Under §552.107(1), Texas Government Code, certain legal matters are considered privileged and thus are not subject to disclosure. The case analyses rendered by Commission appeals attorneys in furtherance of professional legal services to the Commission have been protected from disclosure under §552.107(1). Once OAG makes a decision for a governmental body concerning the disclosure of a specific, clearly delineated category of information, that governmental body need not seek future OAG decisions regarding its ability to withhold such information, provided the elements of law, fact, and circumstances on which the decision was based have not changed in subsequent information requests. Such rulings that a governmental body may rely on are known as "previous determinations." Before Texas enacted the law making UC information privileged--not public--for purposes of the Public Information Act, OAG granted the Agency two previous determinations. Both ruled that a confidential case analysis rendered by Commission appeals attorneys in furtherance of professional legal services to the Commission is an exception to disclosure, pursuant to Texas Government Code §552.107(1).

In these proposed rules, the Commission has chosen to maintain the status quo in Commission operations by:

- using the definition of public domain information set forth in 20 C.F.R. §603.2(c), as interpreted by the Commission and allowing appropriate Agency organization information, Texas UC law, and any Texas UC administration agreements to be released;

- continuing the practice of holding entire appeals records and decisions as confidential and not releasable; and

- continuing the current practice of releasing de-identified Commission-designated precedent case digests as statements of general applicability under the definition of public domain information.

Disclosure of confidential UC information is permissible under certain exceptions if authorized by state law and if such disclosure does not interfere with the efficient administration of the state UC law. Disclosure to individuals and employers of their own confidential UC information--provided it is for UC purposes--is required under 20 C.F.R. §603.6(a). For example, a claimant's UC information can be released to that particular individual; likewise, employer information can be disclosed to that specific employer. The federal regulations also permit disclosure of such information for non-UC purposes under certain specified circumstances. However, DOL makes clear that these disclosures for non-UC purposes must be subject to cost reimbursement, as grant funds may not be used to pay for such disclosure costs. These proposed rules allow claimants or employers access to their own UC information, even if the request is for non-UC purposes, subject to cost reimbursement, unless such access could conflict with the administration of UC such as releasing a confidential informant's name or attorney-client privileged information. The federal regulations also permit states to disclose confidential UC information, including identifying information, to an employer or claimant's agent, upon presentation of a written release from the particular individual or employer. Or, when a written release is impossible or impracticable to obtain, the agent can present such other form of consent as is permitted under state law.

Federal rules treat an elected official performing services for a constituent regarding UC matters as the individual's or employer's agent. DOL reasons that when an elected official is acting in response to a constituent's inquiry about a UC matter, such as that individual's UC claim, the elected official is acting on the individual's behalf and thus is effectively the individual's agent in resolving claim-related issues. But because elected officials may receive requests for assistance that do not specifically authorize the disclosure of confidential UC information--even though such disclosure is necessary for the official to adequately respond to the constituent--DOL revised its final rule to permit the elected official to present reasonable evidence of a request for assistance rather than the "written release." Reasonable evidence of a request for assistance might be a letter from the individual or employer requesting assistance or a written record of a telephone request from the individual or employer. DOL explained that in most cases a request for assistance from a U.S. congressman in reviewing a particular claim includes such reasonable evidence and it is unnecessary to request further evidence.

Attorneys retained in a UC matter to represent an individual or employer are also treated as agents of that individual or employer. Because DOL recognized an attorney has legal and ethical obligations, DOL agreed that an attorney's assertion that he or she has been retained to represent an individual or employer on a UC matter is sufficient to authorize the disclosure of the client's confidential UC information to the attorney.

As proposed herein, the Commission has chosen to treat confidential UC information as releasable to an agent when informed consent is obtained, including the allowable disclosures to:

- elected officials performing constituent services, upon presentation of a written release or reasonable evidence that the individual or employer has authorized such disclosure;

- attorneys retained for purposes related to state UC law, if the attorney asserts that he or she is representing the individual or employer; and

- other, non-attorney agents, such as an individual's representative or an employer service agent, provided the required consent is obtained.

Because of the greater potential threat to employer or individual privacy posed by an entity's collection, storage, maintenance, use, and possible misuse of confidential UC information, DOL believes that additional protections, such as a conditional written release, are necessary for these types of third-party disclosures. The federal rules impose certain requirements upon this category of disclosure, including:

- cost reimbursement;

- safeguard and security requirements;

- written, enforceable agreements;

- imposition of penalties for the misuse of data; and

- maintenance of systems sufficient to allow an audit.

The provisions of HB 2120 and SB 1619 impose criminal penalties for the unauthorized use of a claimant's or employer's identifying information, thus meeting a key element of the federal regulations. The Agency obtains written agreements to ensure the information will be kept confidential. These written agreements include provisions for:

- monitoring contractor usage of UC information (including site visits); and

- obtaining reimbursement of costs.

The Agency exchanges information with numerous contractors. Accordingly, certain threshold standards must be met by all third parties to ensure compliance with federal law. At a minimum, the third party must acknowledge that unauthorized release of the UC information could result in the imposition of criminal penalties. But, given the range of potential risks posed by different contractors, safeguarding the release of confidential information will require additional measures above the basic minimum federal standards. However, the Commission also recognizes the important role the Local Workforce Development Boards (Boards) play in administration of workforce programs. Accordingly, to facilitate Boards' oversight and administration of service delivery and eligibility determinations for workforce services, the Commission proposes to permit the release of otherwise confidential employer and claimant information to Texas workforce system contractors and Board contractors for the administration of workforce programs, as appropriate, pursuant to a written agreement containing the safeguards identified in 20 C.F.R. §603.9 and §603.10.

One effective approach--used in the Agency's current monitoring and safeguard agreements--is to perform an individualized risk assessment. Accordingly, these rules establish general categories and parameters to govern the authorized use of UC information, based upon a risk assessment of disclosure by a particular contractor. Likewise, the Agency will continue to draft individual agreements tailored to address such issues as the specific methods of release, the use of the information, and auditing requirements. Such contracting details are developed on an operational level, but will reflect the guiding principles reflected in these proposed rules.

Contractors of other local, state, or federal public officials may seek access to identifying information. The federal regulations define a public official as "an official, agency, or public entity within the executive branch of federal, state, or local government that has responsibility for administering or enforcing a law, or an elected official in the federal, state, or local government." As long as the use of this information is related to the administration of governmental or legal functions, the Commission will permit access to any contractor of any other local, state, or federal public official. These activities may include research related to the law administered by the public official. However, prior to releasing identifying information to any contractor of any public official, the Agency must:

(1) enter into a written agreement with the public official on whose behalf the agent or contractor will obtain information that holds the public official responsible for ensuring that the agent or contractor complies with the safeguards in 20 C.F.R. §603.9, and provides for termination if the state or state UC agency determines that the entity does not follow the safeguards in the agreement;

(2) ensure that appropriate monitoring, based on a risk assessment analysis that includes performing on-site inspections of the agency, entity, or contractor, is in place to ensure that the requirements of the state's law and the agreement to maintain confidentiality in contract required by 20 C.F.R. §603.10 are met;

(3) recoup the costs required to set up the agreement, provide the information, monitor the use, and investigate breaches of the agreement; and

(4) devote staff time to the above activities within the current full-time equivalent cap of the Agency.

The Commission proposes to permit release of otherwise confidential employer and claimant information to nonpublic contractors of federal, state, and local entities, but only on an individualized basis. Under the federal regulations, the Commission must ensure that all costs are recovered up front. Accordingly, these rules propose to allow a risk assessment analysis of each contractor's business practices and uses of confidential UC information, to ensure that where release is appropriate, contracts are tailored to each contractor.

Pursuant to the newly adopted federal regulations, an employer's or individual's agent may access the client's UC information to the same extent as the client, provided the agent first secures written authorization from the employer or individual the agent represents. However, the standards for release are quite different if the requesting entity is a non-agent third party. A non-agent third party lacks written authorization from the employer or individual and typically seeks access to confidential information for business or research purposes.

DOL's final rules recognize that additional protections are needed for releases to non-agent third parties because of the greater potential threat to employer or individual privacy posed by the entity's collection, storage, maintenance, use, and possible misuse of confidential UC information. In particular, DOL stressed that the purpose specified in the release must be limited to providing a service or benefit to the individual signing the release or to carrying out the administration or evaluation of a public program to which the release pertains; if the release

does not meet these requirements, the state may not disclose confidential UC information under this exception to disclosure.

As noted above, HB 2120 and SB 1619 satisfy the federal criminal penalty requirements for misuse of UC data--under Texas law, unauthorized release of this information is a Class A misdemeanor. However, the Agency must ensure that requestors maintain sufficient systems to allow for audit of disclosed information and to allow the Agency to monitor the use, storage, and destruction of the information. Historically, the Agency has not provided such access because previously state law did not impose any criminal penalties for unauthorized use or release of UC information, and the cost and staff time necessary to ensure the non-agent complied with federal requirements was prohibitive. Although releases to non-agent third parties are subject to the same four safeguards applicable to government contractors, such releases are not statutorily mandated. Accordingly, the Commission has chosen to continue its current practice of allowing non-agent third parties access to confidential UC records only on a strict case-by-case basis, rather than on an ongoing or, in particular, electronic online basis. In each instance, as a comprehensive written agreement is developed, the costs of monitoring compliance and the risks of improper use must be fully evaluated and built into the agreement, as well as recovered in full up front.

As previously noted, 20 C.F.R. §603.6(a) requires disclosure to individuals and employers of their own confidential UC information, provided such is for UC purposes. Currently, disclosure of confidential UC information to parties is separately required under the terms of the Narcisco Gutierrez, et al. vs. TWC (Gutierrez) settlement. On August 13, 1998, a full and final settlement was implemented between the parties. In part, the settlement requires the Commission to provide "relevant separation and timeliness information in the Commission's custody, as a matter of routine, to both parties (the claimant and the employer) with the Notice of Hearing it currently sends out." Thus, prior to the hearing, the Agency must mail to both parties all fact-finding statements relating to the work separation and the appeal. Moreover, the Gutierrez agreement requires the mutual exchange of otherwise confidential information in hearings. The terms of the agreement are contractual, binding upon the Commission, and do not expire.

Proposing rules to explicitly allow the sharing of confidential identifying UC information addresses a unique challenge concerning release of certain information where the claimant has been a victim of family violence or stalking. Section 207.046(a)(2), Texas Labor Code, provides that a claimant is not disqualified from receiving UC if that individual left the workplace to avoid family violence or stalking, provided certain evidentiary standards are satisfied. Section 207.046(b), Texas Labor Code, provides, "except as provided by law," such evidence may not be disclosed to any person without the affected claimant's consent.

Arguably, §207.046(b), Texas Labor Code, could be read to prohibit the Agency from meeting Gutierrez requirements because the Agency likely lacks the claimant's consent to provide relevant separation information to both parties in some hearings. Conversely, failure to provide pertinent information to both parties prior to the hearing could hamper administrative process rights if both parties were not fully apprised of the issues prehearing, possibly resulting in inadequately prepared participants. Specifically allowing the sharing of this information with all hearing parties by rule satisfies Gutierrez without violating §207.046(b). Establishing this practice in rule will ensure the disclosure of UC records to a hearing party, meet the terms of the Gutierrez settlement agreement, and avoid any legal challenges related to the release of this information in such circumstances.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER B. BENEFITS, CLAIMS AND APPEALS

The Commission proposes the following amendments to Subchapter B:

§815.18. General Rules for Both Appeal Stages

Section 815.18(2) is reorganized as §815.18(2)(A).

New §815.18(2)(B) states that the Agency shall provide copies of the relevant separation and timeliness information in its custody to both parties with the Notice of Hearing, including:

(i) all information received from the parties in response to, or in protest of, a claim for unemployment insurance;

(ii) all fact-finding statements relating to the work separation; and

(iii) the appeal from the determination of the work separation.

SUBCHAPTER E. CONFIDENTIALITY AND DISCLOSURE OF STATE UNEMPLOYMENT COMPENSATION INFORMATION

The Commission proposes new Subchapter E, as follows:

§815.161. Scope and Purpose

Section 815.161(a) states that the purpose of the subchapter is to implement the federal regulations, 20 C.F.R. Part 603, and state law, Texas Labor Code, Chapter 301, Subchapter F, regarding the confidentiality, custody, use, preservation, and disclosure of unemployment compensation information.

Section 815.161(b) explains that this subchapter is limited to the confidentiality requirements in federal and state laws and regulations specifically regarding unemployment information. The section further states that additional limitations on the release, custody, use, preservation, and disclosure of information maintained in unemployment insurance records may be imposed by other laws and regulations.

Section 815.161(c) sets out that no right or obligation of the Agency, party to a claim, employer, or third party to invoke limitations or confidentiality requirements based on such separate laws or regulations is waived or limited by this subchapter. Additionally, this subchapter does not address any right or obligation a party to an unemployment compensation claim may have to redisclose unemployment insurance information regarding his or her own claim or unemployment insurance tax records obtained lawfully from the Agency.

§815.162. Definitions

Section 815.162 sets forth the definitions for terms used throughout Subchapter E of Chapter 815.

Section 815.162(1) defines "confidential unemployment compensation information" as unemployment compensation information in the records of the Agency, which includes identifying information regarding any individual or past or present employer or employing unit--including any information that foreseeably could be combined with other publicly available information to reveal identifying information regarding the individual, employer, or employing unit.

Section 815.162(2) defines "informed consent release" as a written grant of authorization that meets the requirements of §815.166 of this subchapter made by an individual or employer to a third party to allow access to confidential unemployment compensation information. When a written release is impossible or impracticable to obtain, the third party may present such other form of consent as is permitted by the Agency.

Section 815.162(3) defines "party" as the employer or claimant to whom the confidential unemployment compensation information relates, including a base period employer that has appealed a notice of chargeback regarding a specific claim. This term does not include any past or present employer or claimant who is not the subject of the particular claim, except an employer that appealed a notice of chargeback relating to an employee in the chargeback period.

Section 815.162(4) defines "public official" as:

(A) an official, agency, or public entity within the executive branch of federal, state, or local government that has responsibility for administering or enforcing a law; or

(B) an elected official in the federal, state, or local government.

Section 815.162(5) defines "unemployment compensation information" as information in the records of the Agency that pertains to the administration of the Texas Unemployment Compensation Act, including any information collected, received, developed, or maintained in the administration of unemployment compensation benefits, the unemployment compensation tax system or the unemployment compensation benefit and tax appeal system.

§815.163. Disclosure of Confidential Unemployment Compensation Information

Section 815.163(a) states that the Agency shall not disclose confidential unemployment compensation information except in compliance with federal law, state law, and this subchapter--but notwithstanding any other provision of this chapter.

Section 815.163(b) explains that the Agency shall not disclose confidential unemployment compensation information if such disclosure interferes with the efficient administration of the state unemployment compensation law. In evaluating interference with efficient administration, the Agency may consider factors including, but not limited to, the burdensomeness of the request and whether the request places an employer's or individual's privacy at unacceptable risk.

§815.164. Mandatory and Permissive Disclosures

Section 815.164(a) clarifies that the Agency shall disclose confidential unemployment compensation information if disclosure is necessary for the proper administration of the unemployment compensation program.

Section 815.164(b) explains that disclosure necessary for the proper administration of the unemployment compensation program includes, but is not limited to, disclosure required under 20 C.F.R. §603.6, as well as disclosure to claimants, employers, and third parties, as necessary, for purposes of unemployment administration and adjudication processes under this chapter.

§815.165. Exceptions to Confidentiality Requirements

Section 815.165(a) allows the Agency to disclose public domain information. For purposes of this section, public domain information is defined to include directory information about the organization of the state, the Commission, and appellate authorities, as well as the names and positions of officials and employees; information about the state unemployment compensation law (and applicable federal law), provisions, rules, regulations, and interpretations, including statements of general policy and interpretations of general applicability; and any agreement relating to the administration of the state unemployment compensation law. Commission-designated precedent case digests from which all individually identifiable information has been removed also constitute public domain information. But public domain information does not include information historically excepted from disclosure under the Public Information Act, Chapter 552, Texas Government Code, including, but not limited to, attorney/client privileged information; interagency memoranda containing advice, opinion, or recommendation to policy makers or decision makers; or other items historically excepted from disclosure under the Public Information Act.

Section 815.165(b) states that the Agency may disclose confidential unemployment compensation information about an individual or employer to that individual or employer, respectively, but in no event does this restrict the Agency from withholding information historically excepted from disclosure including, but not limited to, confidential informant or attorney-client privileged information, or tax audit techniques.

Section 815.165(c) provides that the Agency may disclose confidential unemployment compensation information, so long as the requestor provides a written release demonstrating informed consent signed by the individual or the employer whose records are requested, and if the written release demonstrated informed consent.

Section 815.165(d)(1) - (5) states that the Agency may disclose confidential unemployment compensation information, based on informed consent, to the following:

(1) An agent who acts for or in the place of an individual or an employer by the authority of that individual or employer if the agent presents a written release signed by the party to be represented. If a written release is impossible or impracticable to obtain, the Agency may accept other documentation sufficient to establish informed consent.

(2) An elected official performing constituent services, so long as the official presents reasonable evidence of authorization to obtain the information, such as a letter from the individual or employer requesting the elected official's assistance or a written record of a telephone request from the individual or employer that the individual or employer has authorized such disclosure.

(3) A licensed attorney retained for purposes unrelated to the state's unemployment compensation law; if the attorney provides a written statement declaring that he or she has been retained to represent the individual or employer, the requirements of a written release are met. An attorney retained for purposes related to the state's unemployment compensation law may assert that he or she is representing the individual or employer, and such assertion need not be in writing.

(4) A third party that is not acting as an agent, but only if that entity provides the Agency with a copy of an informed consent release consistent with the requirements of §815.166 of this subchapter.

(5) A third party seeking confidential information on an ongoing basis, only if that entity submits an informed consent release consistent with the requirements of §815.166. This requirement applies even if the third party is an agent seeking information on an ongoing basis.

Section 815.165(e) provides that the Agency may disclose confidential unemployment compensation information to a public official for use in the performance of his or her official duties, including the administration or enforcement of law or execution of the official responsibilities of a federal, state, or local elected official. Administration of law includes research related to the law administered by the public official. Execution of official responsibilities does not include solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.

Section 815.165(f) states that the Agency may disclose confidential unemployment compensation information to a public official's agent or contractor if such disclosure is permissible under 20 C.F.R. §603.5(e) and only after evaluating the following factors:

(1) the potential threat to the employer's or individual's privacy posed by an entity's collection, storage, maintenance, use, and possible misuse of confidential unemployment compensation information;

(2) the costs associated with such disclosure;

(3) the agent or contractor's ability to comply with the requirements in 20 C.F.R. §603.9 regarding safeguards and security of confidential unemployment compensation information;

(4) the costs of enforcement, including investigation and assessment of penalties for misuse of data;

(5) the costs to develop, monitor, and maintain systems sufficient to allow audit of the information;

(6) the personnel, travel, and equipment expenses associated with periodic monitoring and on-site audits required by 20 C.F.R. §603.10; and

(7) whether the disclosure is for purposes of solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.

Section 815.165(g) explains that the Agency may disclose confidential unemployment compensation information to parties for purposes of claims adjudications, hearings and appeals, consistent with this chapter.

Section 815.165(h) provides that the Agency may disclose confidential unemployment compensation information to a federal official for purposes of UC program oversight and audits, including disclosures under 20 C.F.R. Parts 29 and 601, as well as under 20 C.F.R. Parts 96 and 97.

Section 815.165(i) clarifies that the confidentiality requirements of this chapter do not apply to information collected exclusively for statistical purposes under a cooperative agreement with the Bureau of Labor Statistics (BLS). Further, this chapter's requirements do not restrict or impose any condition on the transfer of any other information to BLS under an agreement, or the disclosure or use of such information by BLS.

§815.166. Informed Consent Release

Section 815.166(1) - (5) allows the Agency to disclose confidential unemployment compensation information upon submission of an informed consent release as set forth in this section. An informed consent release is a written release that must be signed by the individual or employer, and must specify the following:

(1) The information to be disclosed;

(2) That the information will be obtained through access of state government files;

(3) The purpose or purposes for which the information is sought;

(4) That the information obtained under the release will be used only for that purpose or purposes;

(5) The individuals or entities that may receive the information; and

(6) A purpose limited to assisting the individual with obtaining a service or benefit, or meeting a federal or state law requirement for the administration or evaluation of a public program to which the release pertains.

§815.167. Subpoenas and Court Orders

Section 815.167(1) - (2) states that the Agency may disclose confidential unemployment compensation information in compliance with:

(1) a court order specifically requiring such disclosure; or

(2) a subpoena issued by a local, state, or federal official, other than a court clerk, provided the official possesses legal authority to obtain such information by subpoena under state or federal law.

§815.168. Charges for Disclosure of Unemployment Compensation Information

Section 815.168(a) requires the Agency to recoup the cost of providing unemployment compensation information consistent with 20 C.F.R. §603.8. It allows the Agency to charge actual charges and to set standardized charges for items routinely requested.

Section 815.168(b) states that the Agency may only release unemployment compensation information for non-unemployment compensation purposes to the following individuals if the unemployment compensation program is reimbursed and there is a written, enforceable confidentiality agreement:

(1) third-party requestors;

(2) public officials; and

(3) contractors of public officials, provided the public officials remain liable for the actions of the contractor.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and local governments expected as a result of enforcing or administering the rules.

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to persons required to comply with the rules.

There is no anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering the rules.

Economic Impact Statement and Regulatory Flexibility Analysis

The Agency has determined that the proposed rules will not have an adverse economic impact on small businesses as these proposed rules place no new requirements on small businesses.

Our reasoning is strongly influenced by the requirements of 20 C.F.R. Part 603 *(Federal Register,* September 27, 2006), which provides in §603.8 that federal unemployment compensation grant funds may not be used to pay any of the costs of making any disclosure of unemployment compensation information, that the costs to a state unemployment compensation agency of processing and handling a request for disclosure of information must be calculated in accordance with the cost principles and administrative requirements of 29 C.F.R. Part 97 and OMB Circular No. A-87, and that the costs to a state unemployment compensation agency of making a disclosure of unemployment compensation information must be paid by the recipient of the information or another source paying on behalf of the recipient. We do not consider the requirement to recover the costs of making the disclosure of unemployment compensation information covered by these rules either a new requirement or a requirement of these rules, themselves, nor do we consider the requirement that the disclosure of this unemployment compensation information must be paid by the recipient of the information (or another source paying on behalf of the recipient) to be either a new requirement or one created by these rules.

Mark Hughes, Director of Labor Market Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

LaSha Lenzy, Director of the Unemployment Insurance Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed amendments will be to ensure compliance with federal and state requirements.

The Agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, the Commission sought the involvement of each of Texas' 28 Boards. The Commission provided the policy concept to each of the Boards for consideration and review. During the rulemaking process, the Commission considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register.*

SUBCHAPTER B. BENEFITS, CLAIMS AND APPEALS

40 TAC §815.18

The amendment is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities. Further, these rules are proposed under Texas Labor Code §301.085(b), which requires that, consistent with federal law, the Commission shall adopt and enforce reasonable rules governing the confidentiality, custody, use, preservation, and disclosure of unemployment compensation information. The rules must include safeguards to protect the confidentiality of identifying information regarding any individual or any past or present employer or employing unit contained in unemployment compensation information, including any information that foreseeably could be combined with other publicly available information to reveal identifying information regarding the individual, employer, or employing unit, as applicable.

The proposed amendment affects Texas Labor Code, Title IV.

§815.18. General Rules for Both Appeal Stages.

This section shall be applicable to appeals both to the appeal tribunal and to the Commission.

(1) Issuance of subpoenas.

(A) Subpoenas to compel the attendance of witnesses and the production of records for any hearing of an appeal may be issued at the direction of the Commission or its designee or an appeal tribunal. A subpoena may be issued either at the request of a party or on the motion of the Commission or its designee or the appeal tribunal. The party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case. The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.

(B) A witness subpoenaed to appear before an appeal tribunal, the Commission or its designee, or a court may be paid a fee and mileage for the appearance. The fee shall be $20 per day, and for miles necessarily traveled to and returning from a hearing, the rate per mile shall be at the rate provided for state employees in the State Appropriations [~~Appropriation~~] Act, or as otherwise required by law. The fee as provided in this section and the mileage shall be paid from the unemployment compensation administration fund upon proper certification of the appeal tribunal, the Commission or its designee, or the court, and upon certification of the witness that the fees and mileage are just, true, and unpaid.

(2) Provision of [~~Request for~~] Agency records [~~by a party~~].

(A) Upon the request of a party to a proceeding, the Agency shall provide copies of all records pertaining to that proceeding, except for records subject to privileges under state or federal law or regulation. Other Agency records shall be produced only if the party specifies the exact information desired, and the necessity of the records to allow the party to properly present its claim; the production of records shall be subject to confidentiality limitations and privileges under state or federal law or regulation.

(B) The Agency shall provide copies of the relevant separation and timeliness information in the Agency's custody to both parties with the Notice of Hearing, including:

(i) all information received from the parties in response to, or in protest of, a claim for unemployment insurance;

(ii) all fact-finding statements relating to the work separation; and

(iii) the appeal from the determination of the work separation.

(3) Representation before appeal tribunal and the Commission.

(A) An individual who is a party to a proceeding may appear before an appeal tribunal or the Commission or its designee.

(B) A partnership may be represented by any of its members or a duly authorized representative. Any corporation or association may be represented by an officer or a duly authorized representative.

(C) Any party may appear by an attorney at law or by any other individual who is qualified to represent others.

(D) The Commission or its designee or an appeal tribunal may refuse to allow any individual to represent others in any proceeding before it if the individual acts or speaks in an unethical manner or if the individual intentionally and repeatedly fails to observe the provisions of the Act or the rules of the Agency.

(4) Removing a party from a proceeding. The Commission or its designee or an appeal tribunal may, after an appropriate warning, expel from any proceeding any individuals, whether or not a party, who fail [~~fails~~] to comport themselves in a manner befitting the proceeding. The Commission or its designee or an appeal tribunal may then continue with the proceeding, hear evidence, and render a decision on the appeal.

(5) Appeal Information. An appeal tribunal decision sent to a party of interest, or the Commission's decision sent to a party, will include or be accompanied by a notice specifying the appeal rights of the parties, the procedure for filing further appeal, and the time period within which an appeal shall be filed.

(6) Retention of Decisions. Copies of decisions of the Commission and of appeal tribunals shall be kept in accordance with the approved records retention schedule.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802262
Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery
Texas Workforce Commission
Earliest possible date of adoption: June 15, 2008
For further information, please call: (512) 475-0829

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SUBCHAPTER E. CONFIDENTIALITY AND DISCLOSURE OF STATE UNEMPLOYMENT COMPENSATION INFORMATION

40 TAC §§815.161 - 815.168

The new rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities. Further, these rules are proposed under Texas Labor Code §301.085(b), which requires that, consistent with federal law, the Commission shall adopt and enforce reasonable rules governing the confidentiality, custody, use, preservation, and disclosure of unemployment compensation information. The rules must include safeguards to protect the confidentiality of identifying information regarding any individual or any past or present employer or employing unit contained in unemployment compensation information, including any information that foreseeably could be combined with other publicly available information to reveal identifying information regarding the individual, employer, or employing unit, as applicable.

The proposed new rules affect Texas Labor Code, Title IV.

§815.161. Scope and Purpose.

(a) The purpose of this subchapter is to implement the federal regulations, 20 C.F.R. Part 603, and state law, Texas Labor Code, Chapter 301, Subchapter F, regarding the confidentiality, custody, use, preservation, and disclosure of unemployment compensation information.

(b) This subchapter is limited to the confidentiality requirements in federal and state laws and regulations specifically regarding unemployment information. Other laws and regulations may impose additional limitations on the release, custody, use, preservation, and disclosure of information maintained in unemployment insurance records.

(c) This subchapter does not:

(1) limit or waive any right or obligation of the Agency, party to a claim, employer, or third party to invoke limitations or confidentiality requirements based on such separate laws or regulations; or

(2) address any right or obligation a party to an unemployment compensation claim may have to redisclose unemployment insurance information regarding his or her own claim or unemployment insurance tax records obtained lawfully from the Agency.

§815.162. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Confidential unemployment compensation information--Unemployment compensation information in Agency records, including identifying information regarding any individual or past or present employer or employing unit, or any information that foreseeably could be combined with other publicly available information to reveal identifying information regarding the individual, employer, or employing unit.

(2) Informed consent release--A written grant of authorization that meets the requirements of §815.166 of this subchapter made by an individual or employer to a third party to allow access to confidential unemployment compensation information. When a written release is impossible or impracticable to obtain, the third party may present such other form of consent as is permitted by the Agency.

(3) Party--The employer or claimant to whom the confidential unemployment compensation information relates. A party includes a base period employer that has appealed a notice of chargeback regarding a specific claim. A party does not include any past or present employer or claimant who is not the subject of the particular claim, except an employer that appealed a notice of chargeback relating to an employee in the chargeback period.

(4) Public official--

(A) An official, agency, or public entity within the executive branch of federal, state, or local government with responsibility for administering or enforcing a law; or

(B) An elected official in the federal, state, or local government.

(5) Unemployment compensation information--Information in the Agency's records that pertains to the administration of the Texas Unemployment Compensation Act, including any information collected, received, developed, or maintained in the administration of unemployment compensation benefits, the unemployment compensation tax system, or the unemployment compensation benefit and tax appeal system.

§815.163. Disclosure of Confidential Unemployment Compensation Information.

(a) The Agency shall not disclose confidential unemployment compensation information except in compliance with federal law, state law, and this subchapter.

(b) Notwithstanding any other provision of this chapter, confidential unemployment compensation information shall not be disclosed if such disclosure interferes with the efficient administration of the state unemployment compensation law. In evaluating interference with efficient administration, the Agency may consider factors including, but not limited to, the burdensomeness of the request and whether the request places an employer's or individual's privacy at unacceptable risk.

§815.164. Mandatory and Permissive Disclosures.

(a) The Agency shall disclose confidential unemployment compensation information if disclosure is necessary for the proper administration of the unemployment compensation program.

(b) Disclosure necessary for the proper administration of the unemployment compensation program includes, but is not limited to, disclosure required under 20 C.F.R. §603.6 and disclosure to claimants, employers, and third parties, as necessary, for purposes of unemployment administration and adjudication processes under this chapter.

§815.165. Exceptions to Confidentiality Requirements.

(a) The Agency may disclose public domain information. For purposes of this section, public domain information includes directory information about the organization of the state, the Commission, and appellate authorities, as well as the names and positions of officials and employees; information about the state unemployment compensation law (and applicable federal law), provisions, rules, regulations, and interpretations, including statements of general policy and interpretations of general applicability; and any agreement relating to the administration of the state unemployment compensation law. Commission-designated precedent case digests from which all individually identifiable information has been removed constitute public domain information. Public domain information does not include information historically excepted from disclosure under the Public Information Act, Chapter 552, Texas Government Code, including, but not limited to, attorney/client privileged information; interagency memoranda containing advice, opinion, or recommendation to policy makers or decision makers; or other items historically excepted from disclosure under the Public Information Act.

(b) The Agency may disclose confidential unemployment compensation information about an individual or employer to that individual or employer, respectively , but in no event does this restrict the Agency from withholding information historically excepted from disclosure, including, but not limited to, confidential informant or attorney-client privileged information, or tax audit techniques.

(c) The Agency may disclose confidential unemployment compensation information if the requestor provides a written release signed by the individual or the employer whose records are requested, and if the written release demonstrates informed consent.

(d) The Agency may disclose confidential unemployment compensation information, based on informed consent, to the following:

(1) An agent acting for or in the place of an individual or an employer by the authority of that individual or employer if the agent presents a written release signed by the party to be represented. If a written release is impossible or impracticable to obtain, the Agency may accept other documentation sufficient to establish informed consent.

(2) An elected official performing constituent services provided the official presents reasonable evidence of authorization to obtain the information, such as a letter from the individual or employer requesting the elected official's assistance or a written record of a telephone request from the individual or employer that the individual or employer has authorized such disclosure.

(3) A licensed attorney retained for purposes unrelated to the state's unemployment compensation law; if the attorney provides a written statement declaring that he or she has been retained to represent the individual or employer, the requirements of a written release will have been met. An attorney retained for purposes related to the state's unemployment compensation law may assert that he or she is representing the individual or employer, and such assertion need not be in writing.

(4) A third party that is not acting as an agent, only if that entity provides the Commission with a copy of an informed consent release consistent with the requirements of §815.166 of this subchapter.

(5) A third party seeking confidential information on an ongoing basis, only if that entity submits an informed consent release consistent with the requirements of §815.166 of this subchapter. This requirement applies even if the third party is an agent seeking information on an ongoing basis.

(e) The Agency may disclose confidential unemployment compensation information to a public official for use in the performance of his or her official duties, including the administration or enforcement of law or execution of the official responsibilities of a federal, state, or local elected official. Administration of law includes research related to the law administered by the public official. Execution of official responsibilities does not include solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.

(f) The Agency may disclose confidential unemployment compensation information to a public official's agent or contractor if such disclosure is permissible under 20 C.F.R. §603.5(e) and only after evaluating the following factors:

(1) The potential threat to the employer's or individual's privacy posed by an entity's collection, storage, maintenance, use, and possible misuse of confidential unemployment compensation information;

(2) The costs associated with such disclosure;

(3) The agent or contractor's ability to comply with the requirements in 20 C.F.R. §603.9 regarding safeguards and security of confidential unemployment compensation information;

(4) The costs of enforcement, including investigation and assessment of penalties for misuse of data;

(5) The costs to develop, monitor, and maintain systems sufficient to allow audit of the information;

(6) The personnel, travel, and equipment expenses associated with periodic monitoring and on-site audits required by 20 C.F.R. §603.10; and

(7) Whether the disclosure is for purposes of solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.

(g) The Agency may disclose confidential unemployment compensation information to parties for purposes of claims adjudications, hearings, and appeals, consistent with this chapter.

(h) The Agency may disclose confidential unemployment compensation information to a federal official for purposes of UC program oversight and audits, including disclosures under 20 C.F.R. Parts 29 and 601, as well as under C.F.R. Parts 96 and 97.

(i) The confidentiality requirements of this chapter do not apply to information collected exclusively for statistical purposes under a cooperative agreement with the Bureau of Labor Statistics (BLS). Further, this chapter's requirements do not restrict or impose any condition on the transfer of any other information to BLS under an agreement, or the disclosure or use of such information by BLS.

§815.166. Informed Consent Release.

The Agency may disclose confidential unemployment compensation information upon submission of an informed consent release as set forth in this section. An informed consent release is a written release that must be signed by the individual or employer, and must specify the following:

(1) The information to be disclosed;

(2) That the information will be obtained through access of state government files;

(3) The purpose or purposes for which the information is sought;

(4) That the information obtained under the release will be used only for that purpose;

(5) The individuals or entities that may receive the information; and

(6) A purpose limited to assisting the individual with obtaining a service or benefit, or meeting a federal or state law requirement for the administration or evaluation of a public program to which the release pertains.

§815.167. Subpoenas and Court Orders.

The Agency may disclose confidential unemployment compensation information in compliance with:

(1) a court order specifically requiring such disclosure; or

(2) a subpoena issued by a local, state, or federal official, other than a court clerk, provided the official possesses legal authority to obtain such information by subpoena under state or federal law.

§815.168. Charges for Disclosure of Unemployment Compensation Information.

(a) The Agency shall recoup the cost of providing unemployment compensation information consistent with 20 C.F.R. §603.8. The Agency may charge actual charges and may set standardized charges for items routinely requested.

(b) The Agency may only release unemployment compensation information for non-unemployment compensation purposes to the following individuals if the unemployment compensation program is reimbursed and there is a written, enforceable confidentiality agreement:

(1) Third-party requestors;

(2) Public officials; and

(3) Contractors of a public official provided the public official remains liable for the actions of the contractor.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 29, 2008.

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Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 11. SURFACE MINING AND RECLAMATION DIVISION

SUBCHAPTER A. RULES OF PRACTICE AND PROCEDURE

16 TAC §11.1

Proposed repeal of §11.1, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802237

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SUBCHAPTER B. SPECIAL EXCEPTIONS TO THE RULES OF PRACTICE AND PROCEDURE--URANIUM MINING

DIVISION 1. DEFINITIONS AND GENERAL RULES

16 TAC §11.12

Proposed repeal of §11.12, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802238

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DIVISION 2. PARTIES

16 TAC §11.21

Proposed repeal of §11.21, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802239

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DIVISION 3. NOTICE AND HEARING

16 TAC §§11.31, 11.33, 11.34, 11.37

Proposed repeal of §§11.31, 11.33, 11.34, and 11.37, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802240

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DIVISION 4. DECISIONS OF COMMISSION

16 TAC §11.52, §11.53

Proposed repeal of §11.52 and §11.53, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802241

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SUBCHAPTER C. SUBSTANTIVE RULES--URANIUM MINING

DIVISION 1. INTRODUCTION

16 TAC §11.71, §11.72

Proposed repeal of §11.71 and §11.72, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802242

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DIVISION 2. DEFINITIONS

16 TAC §11.81, §11.82

Proposed repeal of §11.81 and §11.82, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six

months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802243

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DIVISION 3. SURFACE MINING PERMITS

16 TAC §§11.91 - 11.100

Proposed repeal of §§11.91 - 11.100, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802244

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DIVISION 4. TERMINATION, SUSPENSION, REVISION, AND CORRECTION OF PERMITS

16 TAC §§11.111 - 11.115

Proposed repeal of §§11.111 - 11.115, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802245

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DIVISION 5. EXPLORATION ACTIVITIES

16 TAC §§11.131 - 11.139

Proposed repeal of §§11.131 - 11.139, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802246

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DIVISION 6. RECLAMATION

16 TAC §§11.151 - 11.154

Proposed repeal of §§11.151 - 11.154, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802247

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DIVISION 7. DESIGNATION OF LANDS UNSUITABLE FOR SURFACE MINING

16 TAC §§11.161 - 11.167

Proposed repeal of §§11.161 - 11.167, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802248

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DIVISION 8. MINE CLOSING AND RELEASE

16 TAC §11.181, §11.182

Proposed repeal of §11.181 and §11.182, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802249

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DIVISION 9. REPORTS AND REPORTING

16 TAC §§11.191 - 11.194

Proposed repeal of §§11.191 - 11.194, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802250

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DIVISION 10. PERFORMANCE BONDS

16 TAC §§11.201 - 11.206

Proposed repeal of §§11.201 - 11.206, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802251

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CHAPTER 11. URANIUM EXPLORATION AND SURFACE MINING

SUBCHAPTER A. GENERAL ADMINISTRATIVE RULES

16 TAC §§11.1 - 11.4

Proposed new §§11.1 - 11.4, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802252

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SUBCHAPTER B. PERMITS FOR URANIUM EXPLORATION AND SURFACE MINING

16 TAC §§11.21 - 11.33, 11.41 - 11.46

Proposed new §§11.21 - 11.33, 11.41 - 11.46, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802253

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SUBCHAPTER C. DESIGNATION OF LANDS UNSUITABLE FOR SURFACE MINING

16 TAC §11.71, §11.72

Proposed new §11.71 and §11.72, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802254

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SUBCHAPTER D. SURFACE MINING RECLAMATION, MINE CLOSING, AND RELEASE

16 TAC §§11.81 - 11.86

Proposed new §§11.81 - 11.86, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802255

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SUBCHAPTER E. REPORTING, RECORD MAINTENANCE, AND PERFORMANCE BONDS

16 TAC §§11.91 - 11.94

Proposed new §§11.91 - 11.94, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802256

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SUBCHAPTER F. ENFORCEMENT BY THE COMMISSION

16 TAC §§11.151 - 11.165

Proposed new §§11.151 - 11.165, published in the October 26, 2007, issue of the *Texas Register* (32 TexReg 7601), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on April 29, 2008.

TRD-200802257

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TITLE 22. EXAMINING BOARDS

PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. GENERAL PROVISIONS

SUBCHAPTER F. EDUCATION, EXPERIENCE, EDUCATIONAL PROGRAMS, TIME PERIODS AND TYPE OF LICENSE

22 TAC §535.62

The Texas Real Estate Commission withdraws the proposed amendments to §535.62 which appeared in the March 21, 2008, issue of the *Texas Register* (33 TexReg 2472).

Filed with the Office of the Secretary of State on May 5, 2008.

TRD-200802345
Loretta R. DeHay
General Counsel and Assistant Administrator
Texas Real Estate Commission
Effective date: May 5, 2008
For further information, please call: (512) 465-3900

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SUBCHAPTER G. MANDATORY CONTINUING EDUCATION

22 TAC §535.71

The Texas Real Estate Commission withdraws the proposed amendments to §535.71 which appeared in the March 21, 2008, issue of the *Texas Register* (33 TexReg 2473).

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TRD-200802348
Loretta R. DeHay
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Texas Real Estate Commission
Effective date: May 5, 2008
For further information, please call: (512) 465-3900

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SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §535.212

The Texas Real Estate Commission withdraws the proposed amendments to §535.212 which appeared in the March 21, 2008, issue of the *Texas Register* (33 TexReg 2477).

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TRD-200802349
Loretta R. DeHay
General Counsel and Assistant Administrator
Texas Real Estate Commission
Effective date: May 5, 2008
For further information, please call: (512) 465-3900

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 61. CRIME VICTIMS' COMPENSATION

SUBCHAPTER K. ADDRESS CONFIDENTIALITY PROGRAM

1 TAC §§61.1001, 61.1005, 61.1010, 61.1015, 61.1020, 61.1025, 61.1030, 61.1035, 61.1040, 61.1045, 61.1050, 61.1060, 61.1065, 61.1080, 61.1085, 61.1090

The Office of the Attorney General (OAG) adopts new Subchapter K to Chapter 61 (Crime Victim's Compensation) §§61.1005, 61.1010, 61.1015, 61.1020, 61.1025, 61.1030, 61.1035, 61.1040, 61.1045, 61.1060, 61.1065, 61.1080, 61.1085 and 61.1090, without changes to the proposed text as published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2093) and will not be republished. Section 61.1001 and §61.1050 were adopted with changes and will be republished.

The new rules are adopted to implement, interpret, and prescribe the law and minimum standards of practices, procedures, and policies of the OAG relating to providing victims of family violence, sexual assault, and stalking with an address confidentiality program.

According to Article I, Section 31 of the Texas Constitution, the Victims of Crime Auxiliary Fund may be expended as provided by law only for delivering or funding victim-related compensation, services, or assistance. Article 56.54 of the Texas Code of Criminal Procedure provides that the OAG may use the Victims of Crime Auxiliary Fund to cover costs incurred by the attorney general in administering the Address Confidentiality Program (ACP) established under Subchapter C. Additionally, Article 56.93 authorizes the OAG to adopt rules to administer the program.

Section 61.1001 provides definitions of terms used in the Address Confidentiality Program. The definition of "law enforcement agency" provided in the proposed rule was deleted. Because there is no statutory definition of the term and the term is not defined in the enabling statute of the ACP, the OAG will make a determination based on the facts and situation as presented in the future. The definition of "state or local agency" was changed in order for the term to have the same meaning as it appears in all sections of the subchapter.

Section 61.1005 establishes the duties and responsibilities of the OAG in relation to the Address Confidentiality Program.

Section 61.1010 establishes eligibility requirements for an applicant to qualify for participation in the Address Confidentiality Program.

Section 61.1015 establishes the required application information and related documentation that must be provided by an applicant seeking participation in the Address Confidentiality Program.

Section 61.1020 establishes the procedure for approval and certification of participation into the Address Confidentiality Program and issuance of an Address Confidentiality Program card for an approved applicant.

Section 61.1025 requires that a state or local agency must accept the substitute post office address.

Section 61.1030 provides reasons for OAG denial of an applicant or exclusion of a participant in the Address Confidentiality Program.

Section 61.1035 establishes a reconsideration procedure for an applicant denied, or a participant cancelled from participation in the Address Confidentiality Program.

Section 61.1040 establishes requirements for a state or local agency to obtain an exemption to not accept the substitute post office address.

Section 61.1045 provides guidelines for an agency to request a reconsideration of disclosure or exemption.

Section 61.1050 lists specific instances when the OAG shall disclose a participant's true address and provides guidelines for an entity to request disclosure of a participant's true address. The process to seek an exception was changed. Upon further review by the OAG, it was determined that seeking the information should follow the already established process of a Public Information Act request as defined in Texas Government Code §552.

Section 61.1055 was deleted. Upon further review by the OAG, it was determined that seeking the information should follow the already established process of a Public Information Act request as defined in Texas Government Code §552.

Section 61.1060 establishes a procedure for a participant to withdraw from the program.

Section 61.1065 provides for the disposal of mail that can not be forwarded.

Section 61.1070 was deleted. Upon further review by the OAG, it was determined that seeking the information should follow the already established process of a Public Information Act request as defined in Texas Government Code §552.

Section 61.1075 was deleted. Upon further review by the OAG, it was determined that seeking the information should follow the already established process of a Public Information Act request as defined in Texas Government Code §552.

Section 61.1080 establishes guidelines for the destruction of information relating to an application and a participant.

Section 61.1085 establishes that a participant desiring to vote is responsible for complying with all legal voting requirements.

Section 61.1090 establishes that a state or local entity accepting a participant's Address Confidentiality Program address will be responsible for administration of its rules and regulations in compliance with the governing Address Confidentiality Program statutes and administrative rules.

The public comment period began March 14, 2008 and ended April 14, 2008. The following is a summary of Comments received and corresponding Agency responses regarding the proposed amendments.

Comment. Concerning §61.1001, Definitions, The Commissioner of Education, The Texas Education Agency (TEA), expressed that the definition of the term "state or local agency" relates to establishing eligibility to participate in the program and does not appear to apply to the term as used in §61.1025.

Agency Response. The Agency agrees and will revise the definition of the term "state or local agency" under §61.1001(15) to clarify its meaning.

Comment. Concerning §61.1001, Definitions, The TEA recommends revision of the rule to clarify whether §61.1025 or any other provisions of the subchapter are applicable to school districts or open-enrollment charter schools. If §61.1025 is applicable to school districts or open-enrollment charters, TEA requests revision of the rules to clarify the manner in which a school district or open-enrollment charter school may determine the student's eligibility for enrollment under §25.001, Education Code.

Agency Response. The Agency declines to make the suggested change because a determination will need to be made when an exemption is sought.

Comment. Concerning §61.1001, Definitions, Ruth Casarez, of Legal Hotline for Texans, expressed that organizations such as Legal Hotline for Texans should be included under the §61.1001(10) definition of "other entity" because such programs do not fit the definition of "Family Violence Center" set out in V.T.C.A., Human Resources Code §51.002.

Agency Response. The Agency disagrees and declines to make the suggested change. Legal Hotline for Texans, is included as an "other entity" under §61.1001(10) if such an entity provides those "shelter services" listed under §61.1001(13) either directly, by referral, or through formal arrangements with other agencies.

Comment. Concerning §61.1001, Definitions, Ruth Casarez, of Legal Hotline for Texans, suggested that in the definition of "victim of family violence" under §61.1001(19), the word "alleged" should be changed to "threatened" to avoid confusion about who would be eligible to participate in the ACP.

Agency Response. The Agency disagrees and declines to make the suggested change.

Comment. Concerning §61.1015, Application for Participation in the Address Confidentiality Program, the Texas Council on Family Violence (TCFV) recommended a revision to §61.1015(b) to add the term "one form of a range of" independent documentary evidence. TCFV expressed that this additional language would expand the type of documentary evidence that an applicant may submit in order to be eligible for participation in the Program. TCFV also recommended the deletion of §61.1015(b)(5), which states "any other information the OAG deems appropriate to be included on the application."

Agency Response. The Agency disagrees and declines to make the suggested change. The meaning of the term "one form of a range of" independent documentary evidence is unclear. Section 61.1015(b)(5) gives the OAG the discretion to review any information included on the application, thereby expanding an applicant's access to eligibility into the Program.

Comment. Concerning §61.1040, Request for Agency Exemption, the TCFV recommended that §61.1040 be entirely deleted. TCFV recognized that Tex. Code Crim. Proc. Art. 56.89(b) states that the OAG may by rule permit an agency to require a participant to provide their true residential, business, or school address if necessary for the agency to perform a duty or function imposed on it by law or administrative requirement. However, TCFV expressed that §61.1040 is optional and is an unnecessary expansion of access to a participant's information, which endangers the safety of the participant. In addition, TCFV expressed that §61.1040 is contrary to the intent of the legislation, which is to protect participant identities from their offenders.

Agency Response. The Agency disagrees and declines to make the recommended change. Statutes exist that require certain governmental agencies to have an individual's true residential address in order to function.

Comment. Concerning §61.1040, Request for Agency Exemption, Texas Senator Eddie Lucio, Jr. expressed that exemptions for state and local agencies to obtain access to participant information should be limited to only those agencies where the need can clearly be identified as required by law or administrative function and, only then, if properly vetted to ensure that it is absolutely necessary.

Agency Response. The Agency agrees. Rule §61.1040 requires that an agency submit to the OAG an explanation of the duty or function imposed on the agency by law, or the administrative requirements, for which an exemption is necessary.

Comment. Concerning §61.1045, Request for Reconsideration of Exemption Denial Determination, the TCFV recommended that §61.1045 be entirely deleted. TCFV expressed that the OAG should not permit an agency to require a participant to provide their true residential, business, or school address, as provided in Tex. Code Crim. Proc. Art. 56.89(b).

Agency Response. The Agency disagrees and declines to make the suggested change.

Comment Concerning §61.1050, Exceptions, Texas Senator Eddie Lucio, Jr. expressed that the term "law enforcement" was included in the statute to ensure that the ACP would not hinder a criminal investigation, but the statute was not intended to include releasing information during the course of routine inquiries. Because protecting ACP participant information is vital to participant safety, Senator Lucio asked that the highest level of safeguards be considered.

Agency Response. Upon further review, the OAG deleted proposed rule §61.1055. Requests for information from an excepted agency will follow the already established process of a Public Information Act request.

Comment. Concerning §61.1050, Exceptions, TCFV expressed that the critical need for law enforcement and DFPS to conduct investigations should be weighed in conjunction with the safety of Program participants. For this reason, TCFV recommended that

§61.1050 be strengthened by adding that the OAG shall disclose participant information if requested by a law enforcement agency "for the purpose of conducting an investigation in which the ACP participant has an active case."

Agency Response. The OAG declines to make this change and will leave the determination up to the Public Information Act process.

Comment. Concerning §61.1070 Participant's Consent to Disclose, TCFV recommended that rule §61.1070 be moved to rule §61.1050(4) to ensure that all possible exceptions will go through the same process in order to obtain the participant's confidential address information.

Agency Response. The Agency disagrees and declines to make the recommended change. However, the agency is deleting §61.1070 and §61.1075 so that a determination can follow the already established process of a Public Information Act request.

The amendments are adopted under the Texas Code of Criminal Procedure, Title 1, Article 56.93, which authorizes the Office of the Attorney General to adopt rules reasonable and necessary to implement Article 56.82, in order to serve victims of family violence, sexual assault, or stalking by the creation of an address confidentiality program.

§61.1001. Definitions.

(a) The following words and terms, when used in this subchapter, shall have the following meanings:

(1) Applicant--A person who submits an application to the Office of the Attorney General (OAG) to participate in the Address Confidentiality Program (ACP).

(2) Application--For the purpose of administering the ACP, means the OAG application for participation in the ACP and includes all information and documents submitted by, or on the behalf of, the applicant.

(3) Certification--For the purpose of administering the ACP, means OAG authorization for an applicant to participate in the ACP.

(4) Certified mail--For the purpose of administering the ACP, means any first class letter-size or flat-size mail for which the mailer pays a surcharge to the USPS to be provided with a receipt, and the destination post office records delivery of the mail. Certified mail does not include a package regardless of size or type of mailing.

(5) Counseling--For the purpose of administering the ACP, means victim related guidance, advice, and support with crisis intervention, obtaining information, legal advocacy, prevention of further harm, or meeting other physical, emotional or psychological needs.

(6) Family violence--As defined in Texas Family Code §71.004, means:

(A) an act by a member of family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;

(B) abuse, as that term is defined by §§261.001(1)(C), (E), and (G), by a member of a family or household toward a child of the family or household; or

(C) dating violence, as that term is defined by §71.0021.

(7) First Class Mail--For the purpose of administering the ACP, first class mail means United States Postal Service (USPS) first class letter-size mail and first class flat-size mail:

(A) Letter-size mail, as defined in the USPS Domestic Mail Manual, is mail that is not less than 5 inches long or more than 11 1/2 inches long, and not less than 0.007 inches thick or more than 1/4 inch thick. Letter-size mail may not weigh more than 3.5 ounces.

(B) Flat-size mail, as defined in the USPS Domestic Mail Manual, is mail not more than 15 inches long, more than 12 inches high or more than 3/4 inches thick. Flat-size mail may not weigh more than 13 ounces.

(8) Household--A unit composed of persons living together in the same dwelling, without regard to whether they are related to each other, as defined in Texas Family Code §71.005.

(9) Mail sent by a government agency--Letter-size or flat-size mail sent by a federal, state or local government agency. Mail sent by a government agency does not include a package.

(10) Other entity--For the purpose of administering the ACP, means an entity, whether for profit or nonprofit, that provides the services of a victim's assistance counselor and provides counseling and shelter services to victims of family violence.

(11) Package--For the purpose of administering the ACP, a package shall have the same meaning as parcel, as defined in the USPS Domestic Mail Manual. Parcel is mail that does not meet the mail processing category of letter-size mail or flat-size mail.

(12) Sexual offense--For the purpose of administering the ACP, means sexual assault as defined in §22.011, aggravated sexual assault as defined in §22.021, or prohibited sexual conduct as defined in §25.02 of the Texas Penal Code.

(13) Shelter services--For the purpose of administering the ACP, means the following services provided directly, by referral, or through formal arrangements with other agencies:

(A) 24-hour-a-day shelter;

(B) a crisis call hotline available 24 hours a day;

(C) emergency medical care;

(D) intervention services, including safety planning, understanding and support, information, education, referrals, resource assistance, and individual service plans;

(E) emergency transportation;

(F) legal assistance in the civil and criminal justice systems, including identifying individual needs, legal rights, and legal options and providing support and accompaniment in pursuing those options;

(G) information about educational arrangements for children;

(H) information about training for and seeking employment; and

(I) a referral system to existing community services.

(14) Stalking--has the meaning assigned by Texas Penal Code §42.072.

(15) State or local agency--For the purpose of administering the ACP, a state or local agency includes but is not limited to, a governmental agency of the State of Texas or a Texas county, city, town or municipality.

(16) Texas resident--A person who has a domicile in Texas, who lives for more than a temporary period of time in Texas, or who can show intent to establish a domicile in Texas at the time of the alleged crime. Documentary evidence of the applicant's Texas residency may be established by submitting the following documentation in the name of the applicant:

(A) a lease or rental agreement;

(B) utility bills;

(C) school or work records;

(D) a driver's license;

(E) postmarked mail delivered to the applicant at the Texas residence or intended Texas residence;

(F) written verification from a victim's assistance counselor; or

(G) other documentation approved by the OAG.

(17) True Address--The physical address where the applicant actually resides, is employed, or attends school.

(18) Victim's Assistance Counselor--For the purpose of administering the ACP, means an individual authorized by a state or local agency or other for profit or nonprofit entity to meet with or assist individuals applying for participation in the ACP.

(19) Victim of family violence--An individual against whom family violence has been alleged or committed, as defined in Texas Family Code §71.004.

(b) The definitions in this section will be given their most reasonable meaning unless the content clearly indicates otherwise.

§61.1050. Exceptions.

(a) Pursuant to Texas Code of Criminal Procedure Article 56.90(a)(1)(A), the OAG shall disclose a participant's true residential, business, or school address if requested by:

(1) a law enforcement agency;

(2) the Department of Family and Protective Services for the purpose of conducting a child protective services investigation under Texas Family Code §261; or

(3) the Department of State Health Services or a local health authority for the purpose of making a notification of a communicable disease described under Texas Code of Criminal Procedure Article 21.31, Texas Family Code §54.033, or Texas Health and Safety Code §81.051.

(b) Pursuant to Texas Code of Criminal Procedure Article 56.90(a)(1)(B), the OAG shall disclose a participant's true residential, business, or school address if required by a court order.

(c) A request for disclosure of a participant's true residential, business, or school address from an entity pursuant to this section, must be submitted to the OAG as a Public Information Act request. It is recommended that the requestor submit, along with the Public Information Act request, any supporting documentation, such as the following information:

(1) the name of the agency requesting the disclosure and the statutory exception upon which the agency bases its request;

(2) the name and title of the individual authorized to make the request on behalf of the agency;

(3) a signed statement by the agency representative affirming that the information submitted is correct; and

(4) an original certified copy of the court order, if applicable.

(d) The OAG may require additional information as deemed necessary by the OAG.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2008.

TRD-200802347
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Effective date: May 25, 2008
Proposal publication date: March 14, 2008
For further information regarding this publication, contact Cindy Hodges, Agency Liaison, at (512) 936-1841.

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TITLE 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 33. LICENSING

SUBCHAPTER A. APPLICATION PROCEDURES

16 TAC §33.10

The Texas Alcoholic Beverage Commission (commission or TABC) adopts new §33.10, regulating the citizenship and legal status of applicants for alcoholic beverage licenses and permits, with changes to the proposed text as published in the November 16, 2007, issue of the *Texas Register* (32 TexReg 8243).

Texas Alcoholic Beverage Code (Code) §§6.03, 11.46(a)(11), 61.42(a)(5), 61.42(a)(8) and 109.53 as they relate to the requirement that an applicant for a TABC license or permit be a Texas citizen, or a Texas corporation have been found unconstitutional in *Southern Wine and Spirits v. TABC*, Cause No. A-06-CA-720-LY, in the United States District Court for the Western District of Texas, Austin Division, Final Judgment, May 29, 2007. TABC is enjoined from enforcing those provisions. This rule is adopted to conform the commission's citizenship requirements to the Final Judgment.

Code §1.07, relating to resident aliens was not specifically addressed and found unconstitutional in the Final Judgment, however by a logical extension, to the extent §1.07 relates to the residency and citizenship requirement of resident aliens, or persons otherwise lawfully residing and working in the United States, the legal status of an applicant is also clarified by adoption of this rule.

The commission has received one comment from an individual on the proposed rule text and comments from agency staff. Changes to the rule text were made as a result of the comments.

Comment: Concerning §33.10(b) the commenter states that it appears that the commission is requiring all out-of-state companies, including non-resident manufacturers, non-resident sellers,

and agents for manufacturing tier companies to be legally incorporated in the State of Texas.

Response: The commission agrees to the comment in part and disagrees in part and has changed the rule text to reflect the comment. The intent of the commission is to ensure that all individuals and legal entities to whom a license or permit is issued are authorized to work or conduct business in this state. For purposes of legal entities this requires that the entity be subject to the legal authority of the commission to regulate their operations within the state and be subject to legal process within the state. The rule has been changed to reflect that an entity must be either formed by filing a certificate of formation in this state, or is authorized to transact business in this state as a foreign entity by registering as a foreign entity under the laws of the State of Texas.

Comment: Concerning §33.10(b) agency staff indicated that the rule failed to include additional exceptions to the applicability of the rule. The rule has been changed to include these exceptions.

The new rule is adopted under the authority of §5.31 of the Alcoholic Beverage Code (Code), which authorizes the commission to adopt rules necessary to carry out provisions of the Code.

Cross Reference: Section 5.31 of the Code is affected by the adoption of the new rule.

§33.10. Citizenship and Status.

(a) An individual who applies for a license or permit shall, at the time of filing the application, be a United States citizen or legally authorized to work in the United States. The commission will not issue a permit or license to a person that will cause the person to be in violation of the person's immigration status and/or result in them being illegally in the United States.

(b) No permit shall be issued to a corporation, partnership, firm, association, or other legal entity, other than an individual, unless the entity is formed by filing a certificate of formation or registered to transact business in this state. This requirement does not apply to:

(1) An entity holding a brewer's permit, and other licenses and permits as are necessary to the operation of the brewer's permit,

(2) A holder of an agent's, industrial or carrier's permit, or

(3) A foreign corporation that was engaged in the legal alcoholic beverages business in this State under charter or permit prior to August 24, 1935.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 30, 2008.

TRD-200802285
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Effective date: May 20, 2008
Proposal publication date: November 16, 2007
For further information, please call: (512) 206-3204

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES

SUBCHAPTER B. CONDUCT OF BINGO

16 TAC §402.210

The Texas Lottery Commission (Commission) adopts new 16 TAC §402.210 (relating to House Rules), without changes to the proposed text as published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 1948).

The purpose of the new rule is to set out the minimum requirements for house rules informing players in detail of how a licensed authorized organization will conduct its bingo games. Specifically, the new rule requires licensed authorized organizations to develop and adhere to its house rules, ensure that the house rules are consistently applied, and made available to anyone upon request. The new rule also provides that the house rules shall not conflict with the Bingo Enabling Act or the Charitable Bingo Administrative Rules.

A public comment hearing was held on March 20, 2008. There were no members of the public present at the hearing. No written comments were received during the public comment period.

The new rule is adopted under Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 30, 2008.

TRD-200802282
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: May 20, 2008
Proposal publication date: March 7, 2008
For further information, please call: (512) 344-5012

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SUBCHAPTER D. LICENSING REQUIREMENTS

16 TAC §402.406

The Texas Lottery Commission (Commission) adopts the repeal of §402.406, relating to Exemptions from Licensing Requirements, without changes to the proposal as published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 827).

The Commission is repealing the rule because the rule is no longer necessary as the Bingo Enabling Act does not require organizations to obtain Commission approval of exempt status.

A public comment hearing was held on February 6, 2008. No comments were made at the hearing regarding the proposed repeal. No written comments were received during the public comment period.

The repeal is adopted under Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200802280
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: May 20, 2008
Proposal publication date: February 1, 2008
For further information, please call: (512) 344-5012

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SUBCHAPTER G. COMPLIANCE AND ENFORCEMENT

16 TAC §402.705

The Texas Lottery Commission (Commission) adopts the repeal of §402.705, relating to Compliance Review, without changes to the proposal as published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 827).

The Commission is repealing the rule because during Chapter 402 rule review, the Commission determined that there was no reason to readopt the rule. The rule's subject matter is now covered in §402.715 (relating to Compliance Audit).

A public comment hearing was held on February 6, 2008. One person, representing the Bingo Interest Group, commented at the hearing in favor of the proposed repeal. No written comments were received during the public comment period.

Comment: We understand that the repeal is a clean-up, based on a rules review, and that it just basically leaves in place the compliance audit rules that were done earlier, which we supported, and that this is redundant material, so we support this repeal.

Agency Response: The agency agrees.

The repeal is adopted under Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 30, 2008.

TRD-200802281
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: May 20, 2008
Proposal publication date: February 1, 2008
For further information, please call: (512) 344-5012

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER L. INTENSIVE SUMMER PROGRAM GRANTS

19 TAC §§4.210 - 4.214

The Texas Higher Education Coordinating Board adopts new §§4.210 - 4.214, concerning Intensive Summer Programs Grants, without changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1691).

Specifically, these new rules provide for the establishment of grants and programs to provide intensive academic instruction during the summer semester to promote college readiness to students identified as being at risk in accordance with the Texas Education Code §29.098. Sections 4.210 - 4.214, concerning Intensive Summer Program Grants, are adopted under an interagency agreement with the Texas Education Agency which gives the Coordinating Board the authority to implement Intensive Summer Program Grants in institutions of higher education.

There were no comments received regarding the new rules.

The new sections are adopted under the Texas Education Code, §29.098, which provides the Coordinating Board with the authority to establish, by rule, a pilot program to award grants to participating campuses to provide intensive academic instruction during the summer semester.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 2, 2008.

TRD-200802337
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: May 22, 2008
Proposal publication date: February 29, 2008
For further information, please call: (512) 427-6114

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CHAPTER 17. RESOURCE PLANNING

SUBCHAPTER C. RULES APPLYING TO ALL PROJECTS

19 TAC §17.21

The Texas Higher Education Coordinating Board adopts amendments to §17.21, concerning Resource Planning, without changes to the proposed text as published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 1948).

Specifically, the amendments to §17.21(c)(2) will change the submission date from at least 70 days to at least 80 days prior to the regularly scheduled Board meeting for projects seeking Committee on Strategic Planning and Board approval.

The following comment was received regarding the proposed amendments:

Comment: A comment was received from The University of Texas System. The University of Texas System stated they would not have their Board of Regents approval completed by the proposed earlier 10-day deadline. Unless some accommodations were made for those projects that require either Strategic Planning Committee approval or the full Board approval, the system office would be forced to delay these projects another three months.

Response: The staff agreed and has worked with the system offices to allow for Board of Regents certification forms that are certified in between the due dates and Strategic Planning Committee meetings.

The amendments are adopted under the Texas Education Code, §§61.0572, 61.058, and 51.927.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200802308
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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CHAPTER 21. STUDENT SERVICES

SUBCHAPTER B. DETERMINATION OF RESIDENT STATUS AND WAIVER PROGRAMS FOR CERTAIN NONRESIDENT PERSONS

19 TAC §§21.21 - 21.30

The Texas Higher Education Coordinating Board adopts new §§21.21 - 21.30, concerning Determination of Resident Status and Waiver Programs for Certain Nonresident Persons, without changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1693).

Specifically, §§21.727 - 21.736 are repealed and the sections are herein adopted as §§21.21 - 21.30. The amendments update the section references throughout the new sections.

No comments were received regarding the new sections.

The new sections are adopted under the Texas Education Code, §54.075, which provides the Coordinating Board with the authority to adopt rules to carry out the purposes of Texas Education Code, §§54.0501 - 54.075.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER C. HINSON-HAZLEWOOD COLLEGE STUDENT LOAN PROGRAM

19 TAC §§21.54, 21.55, 21.61, 21.62, 21.64

The Texas Higher Education Coordinating Board adopts amendments to §§21.54, 21.55, 21.61, 21.62, and 21.64, concerning the Hinson-Hazlewood College Student Loan Program, without changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1698).

Specifically, the amendment to §21.54(d) will reflect current procedures for institutional reporting of changes in borrower enrollment status. Rather than providing printed rosters of students to institutions for reporting of enrollment changes, the Board subscribes to the National Student Clearinghouse. Changes in enrollment data reported by participating institutions are processed electronically. Institutions that do not participate in the National Student Clearinghouse report enrollment changes directly to the Board. The amendment to §21.55(a)(6) will correct the statement regarding the borrower's provision of two references. The employment status of a person named as a reference is not relevant to that person's knowledge of the borrower's current address throughout the life of the loan. The amendment to §21.61 will remove a requirement relating to negotiation of warrants that is no longer relevant. All loan funds are disbursed to institutions by Electronic Funds Transfer (EFT); loan warrants are no longer produced. The amendment to §21.62(a)(3)(B) will eliminate a provision that was part of the Revenue Bond covenants and is no longer relevant because these bonds have been retired. The amendment to §21.62(f) will remove language that is not applicable within the HELMS software system. The order of payment application is addressed later in this section. The amendment to §21.64(c) will provide a more accurate description of the current process for the Texas Higher Education Coordinating Board's communication of borrower account status to institutions for the purpose of placing and releasing bars on student records and re-registration.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §§52.31 - 52.41, which provides the Coordinating Board with the authority to establish procedures to administer the Hinson-Hazlewood College Student Loan Program and Texas Education

Code, §52.31, which provides the Coordinating Board with the authority to adopt rules to effectuate the provisions of Texas Education Code, Chapter 52.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
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Texas Higher Education Coordinating Board
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SUBCHAPTER G. TEACH FOR TEXAS LOAN REPAYMENT ASSISTANCE PROGRAM

19 TAC §21.171

The Texas Higher Education Coordinating Board adopts an amendment to §21.171, concerning the Teach for Texas Loan Repayment Assistance Program, without changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1699).

Specifically, the amendment to §21.171 will correct the reference to the statute authorizing the program. Currently rules cite the statute that authorized another loan repayment program for teachers which has not been funded.

No comments were received regarding the amendment.

The amendment is adopted under the Texas Education Code, §56.352, which authorizes the Coordinating Board to adopt rules to administer the program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER K. THE GOOD NEIGHBOR SCHOLARSHIP PROGRAM

19 TAC §21.282, §21.284

The Texas Higher Education Coordinating Board adopts amendments to §21.282 and §21.284, concerning the Good Neighbor Scholarship Program, without changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1700).

Specifically, the amendment to §21.282(6) aligns the definition of "Scholastically qualified" with the language in statute which states the student must meet the institution's basic academic requirements; the reference to "progress towards a degree" has been removed. New §21.284(6) adds language that requires the institution to have a statement on file verifying that the student has registered with the selective service or is exempt from registration under federal law as required in Texas Education Code §51.9095. New §21.284(7) adds the provision allowing an eligible student who is awarded a scholarship to transfer his or her award to another institution if that institution agrees to waive the tuition.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §54.207, which provides the Coordinating Board with the authority to formulate and prescribe a plan governing the admission and distribution of all applicants desiring to qualify under the provisions of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER T. MATCHING FUND EMPLOYMENT PROGRAM FOR PROFESSIONAL NURSING STUDENTS

19 TAC §§21.620 - 21.636

The Texas Higher Education Coordinating Board adopts the repeal of §§21.620 - 21.636, concerning the Matching Fund Employment Program for Professional Nursing Students, without changes to the proposal as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1701).

Specifically, the repeal will delete current Chapter 21, Subchapter T, concerning the Matching Fund Employment Program for Professional Nursing Students, and all sections within it. The Coordinating Board's Advisory Committee for Professional Nursing Financial Aid Programs has determined that funds should be directed to scholarship and loan repayment programs and not to matching fund programs.

No comments were received regarding the repeal.

The repeal is adopted under the Texas Education Code, §61.653, which authorizes the Coordinating Board to establish and administer a matching fund program for professional nursing students.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 1, 2008.

TRD-200802313
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: May 21, 2008
Proposal publication date: February 29, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER U. MATCHING FUND EMPLOYMENT PROGRAM FOR VOCATIONAL NURSING STUDENTS

19 TAC §§21.650 - 21.666

The Texas Higher Education Coordinating Board adopts the repeal of §§21.650 - 21.666, concerning the Matching Fund Employment Program for Vocational Nursing Students, without changes to the proposal as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1701).

Specifically, the repeal will delete current Chapter 21, Subchapter U, concerning the Matching Fund Employment Program for Vocational Nursing Students, and all sections within it. The Coordinating Board's Advisory Committee for Vocational Nursing Financial Aid Programs has determined that funds should be directed to scholarship and loan repayment programs and not to matching fund programs.

No comments were received regarding the repeal.

The repeal is adopted under the Texas Education Code, §61.653, which authorizes the Coordinating Board to establish and administer a matching fund program for vocational nursing students.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 1, 2008.

TRD-200802314
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER X. DETERMINATION OF RESIDENT STATUS AND WAIVER PROGRAMS FOR CERTAIN NONRESIDENT PERSONS

19 TAC §§21.727 - 21.736

The Texas Higher Education Coordinating Board adopts the repeal of §§21.727 - 21.736, concerning Determination of Resident Status and Waiver Programs for Certain Nonresident Persons, without changes to the proposal as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1702).

Specifically, this repeal will delete current Chapter 21, Subchapter X, concerning Determination of Resident Status and Waiver Programs for Certain Nonresident Persons, and all sections within it. The subchapter for determining residency, and all sections within it, will be re-adopted as Chapter 21, Subchapter B, §§21.21 - 21.30, the subchapter in which residency rules were housed prior to Fall 2006.

No comments were received regarding the repeal.

The repeal is adopted under the Texas Education Code, §54.075, which provides the Coordinating Board with the authority to adopt rules to carry out the purposes of Texas Education Code, §§54.0501 - 54.075.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200802336
Bill Franz
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Texas Higher Education Coordinating Board
Effective date: May 22, 2008
Proposal publication date: February 29, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER CC. EARLY HIGH SCHOOL GRADUATION SCHOLARSHIP PROGRAM

19 TAC §§21.951, 21.953, 21.954

The Texas Higher Education Coordinating Board adopts amendments to §§21.951, 21.953, and 21.954 concerning the Early High School Graduation Scholarship Program, with changes to §21.951 and §21.953 of the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1703). Section 21.954 is being adopted without changes.

Specifically, the amendment to §21.951(6) updates the citation and title for Chapter 21, Subchapter B, which deals with residency. The amendment to §21.953(a) would have added the phrase "but prior to September 1, 2007." This change is no longer recommended. Amendments to §21.953(a)(2) and (3), (b)(4) and (5), and (c)(4) and (5), reflect state selective service registration requirements (Texas Education Code §51.9095) for receiving state aid. The amendment to §21.954(d) clarifies the starting deadline for submitting applications. Amendments to §21.954(g) clarify that, in order to receive an award, applicants for the exemption who graduated prior to June 15, 2007, must be residents of Texas and that applicants who graduate on or after that date must be U.S. citizens or otherwise lawfully be in the United States.

The following comment was received regarding the amendments:

Comment: Coordinating Board staff noticed that the amendment to §21.953(a) is not needed.

Response: The Coordinating Board agrees and recommends no amendment be made to §21.953(a).

The amendments are adopted under the Texas Education Code, §56.209, which provides the Coordinating Board with the author-

ity to adopt any rules necessary to administer Texas Education Code, §§56.201 - 56.210.

§21.951. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education, the Chief Executive Officer of the Board.

(3) Graduate, To--To complete all the academic requirements, including course work and examinations, for graduation from high school. This definition does not apply to individuals who meet these requirements but choose to continue enrollment beyond the end of the term in which they meet the graduation requirements.

(4) Institutional aid--Funds which have not originated from any government source.

(5) Program Officer--The individual named by each participating institution's chief executive officer to serve as agent for the Board. The Program Officer is responsible for all activities with respect to the program, including all records and reports reflecting program transactions. Unless otherwise indicated by the administration, the director of student financial aid shall serve as Program Officer.

(6) Resident of Texas--A resident of the State of Texas as determined in accordance with Chapter 21, Subchapter B, of this title (relating to Determination of Resident Status and Waiver Programs for Certain Nonresident Persons). Nonresident students who are eligible to pay resident tuition rates are not residents of Texas.

§21.953. Eligible Students.

(a) To receive an award through the Early High School Graduation Scholarship Program, a student who graduated from high school before September 1, 2005 must:

(1) be a resident of Texas; and

(2) have completed the requirements for a high school diploma in not more than thirty-six consecutive months having completed all years of high school in Texas; and

(3) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from Selective Service registration under federal law.

(b) To receive an award through the Early High School Graduation Scholarship Program, a student who graduated from high school on or after September 1, 2005, but prior to June 15, 2007, must:

(1) be a resident of Texas;

(2) have attended high school exclusively in one or more public high schools in this state;

(3) have successfully completed the Recommended or Distinguished Achievement Program-Advanced High School Program established under Texas Education Code, §28.025, unless the principal or other authorized representative of the student's high school provides a written explanation along with the student's transcript and exemption program application that the courses in the Recommended or Advanced High School Program which the student did not complete were unavailable to the student at the appropriate time in his or her high school career because of:

(A) shortage of qualified teachers;

(B) lack of enrollment capacity; or

(C) another cause not within the person's control, an explanation for which is provided on the transcript by the official;

(4) have graduated:

(A) in not more than 41 consecutive months; or

(B) in not more than 45 consecutive months, if the student graduated with at least 30 hours of college credit; and

(5) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from Selective Service registration under federal law.

(c) To receive an award through the Early High School Graduation Scholarship Program, a student who graduated from high school on or after June 15, 2007, must:

(1) be a citizen of the United States or otherwise lawfully authorized to be present in the United States;

(2) have attended one or more public high schools in Texas for the majority of time the person attended high school;

(3) have successfully completed the Recommended or Distinguished Achievement Program-Advanced High School Program established under Texas Education Code, §28.025, unless the principal or other authorized representative of the student's high school provides a written explanation along with the student's transcript and exemption program application that the courses in the Recommended or Advanced High School Program which the student did not complete were unavailable to the student at the appropriate time in his or her high school career because of:

(A) shortage of qualified teachers;

(B) lack of enrollment capacity; or

(C) another cause not within the person's control, an explanation for which is provided on the transcript by the official;

(4) have graduated from a public high school in Texas:

(A) in not more than 41 consecutive months; or

(B) in not more than 46 consecutive months, if the student graduated with at least 30 hours of college credit; and

(5) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from Selective Service registration under federal law.

(d) A student's eligibility to receive a tuition credit under the Early High School Graduation Scholarship Program begins with the first regular semester or term following the student's graduation, exclusive of summer sessions that immediately follow the student's graduation. A student's eligibility to receive a tuition credit under the program ends six years after it begins, unless the student seeks and is granted an extension under §21.960 of this title (relating to Hardship Extensions).

(e) The months to graduation will be measured beginning with the student's first full month in ninth grade through the date the high school certifies as the date the student completes all the requirements for graduation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER II. EDUCATIONAL AIDE EXEMPTION PROGRAM

19 TAC §§21.1081, 21.1083, 21.1084, 21.1088

The Texas Higher Education Coordinating Board adopts amendments to §§21.1081, 21.1083, 21.1084, and 21.1088, concerning the Educational Aide Exemption Program, without changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1704).

Specifically, the amendment to §21.1081(8) updates the citation and title for Board rules dealing with residency. Amendments to §21.1083(7) and (8) reflect state selective service registration requirements (Texas Education Code §51.9095) for receiving state aid. Amendments to §21.1084 include the addition of subsection (d), which requires students whose financial need is based on adjusted gross income to follow up with prior year income verification if their initial eligibility was based on prior prior-year data. If the verified income does not confirm the student's eligibility, the student will be required to repay the award to the program. Section 21.1084(d) is relettered as §21.1084(e) accordingly. The amendment to §21.1088 adds subsection (c) and clarifies that students who receive an exemption through this title while completing their bachelor's degree may not be required to participate in any field experience or internship consisting of student teaching to receive a teaching certificate (as indicated in Texas Education Code §21.050(c)).

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §54.214, which provides the Coordinating Board with the authority to adopt rules to implement this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER JJ. THE KENNETH H. ASHWORTH FELLOWSHIP PROGRAM

19 TAC §21.2003, §21.2005

The Texas Higher Education Coordinating Board adopts amendments to §21.2003 and §21.2005 concerning The Kenneth H. Ashworth Fellowship Program, with changes to §21.2003 of the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1705). Section 21.2005 is being adopted without changes.

Specifically, the amendments to §21.2003(b) eliminate the Student Services Division's representation on the selection committee in order to separate the staff performing support activities from those involved in the selection process. Following publication of the proposed rules, Coordinating Board staff noticed that further amendment was necessary to accommodate changes in the names of the agency's divisions. The amendment to §21.2005 deletes a specific award amount from the rules to allow for flexibility in setting this amount based on the availability of funds.

The following comment was received regarding the amendments:

Comment: Coordinating Board staff noticed that §21.2003(b) needed to be amended to accommodate changes in the names of the agency's divisions.

Response: The Coordinating Board agreed and §21.2003(b) was changed to clarify that representation on the committee would include three people from at least two of the agency's divisions.

The amendments are adopted under the Texas Education Code, §61.068, which allows the Board to accept gifts and donations from individuals and groups in order to offer programs that encourage students to attend college.

§21.2003. Selection Committee.

(a) A committee is established to accept and evaluate applications from institutions and to select fellowship award recipients.

(b) The committee consists of three members of the Coordinating Board staff appointed by the Commissioner, representing at least two divisions of the agency.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER NN. EXEMPTION PROGRAM FOR VETERANS AND THEIR DEPENDENTS (THE HAZLEWOOD ACT)

19 TAC §§21.2100, 21.2102, 21.2103

The Texas Higher Education Coordinating Board adopts amendments to §§21.2100, 21.2102 and 21.2103, concerning the Exemption Program for Veterans and their Dependents (The Hazlewood Act), without changes to the proposed text as published in

the February 29, 2008, issue of the *Texas Register* (33 TexReg 1705).

Specifically, the amendments to §§21.2100(5), 21.2102(1) and 21.2103(1)(A) all reflect the withdrawal of Attorney General's Opinions GA-0347 and GA-0445 by the Attorney General of Texas. The amendments redefine the term "citizen of Texas" as "resident of Texas," and strike from the eligibility requirements for Hazlewood benefits the requirement that, in order for a veteran or his or her dependents to be eligible for Hazlewood benefits, such veteran must have been a citizen of the United States at the time he or she entered the armed services.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §54.203, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §54.203.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
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Texas Higher Education Coordinating Board
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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS

SUBCHAPTER A. PROVISIONS FOR THE SPECIAL LEVERAGING EDUCATIONAL ASSISTANCE GRANT PROGRAM FOR STUDENTS AT INDEPENDENT INSTITUTIONS

19 TAC §22.1, §22.2

The Texas Higher Education Coordinating Board adopts the repeal of §22.1 and §22.2, concerning the Provisions for the Special Leveraging Educational Assistance Grant Program for Students at Independent Institutions, without changes to the proposal as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1706).

Specifically, this repeal will delete current Chapter 22, Subchapter A, concerning the Provisions for the Special Leveraging Educational Assistance Grant Program for Students at Independent Institutions, and all sections within it. The program is governed by federal regulations and state rules are not needed.

No comments were received regarding the repeal.

The repeal is adopted under the Texas Education Code, §61.229, which provides the Coordinating Board with the authority to adopt rules necessary to implement the Tuition Equalization Grant Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER B. PROVISIONS FOR THE TUITION EQUALIZATION GRANT PROGRAM

19 TAC §§22.22 - 22.30

The Texas Higher Education Coordinating Board adopts amendments to §§22.22 - 22.30 concerning Provisions for the Tuition Equalization Grant Program, with changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1706).

Specifically, §22.22(5) as proposed would have changed a phrase in the definition of "Degree or certificate program of four years or less" from "more than four years" to "four years or less." This change is no longer recommended. The amendment to §22.22(8) deletes the term "Encumbered funds," as this term is no longer a feature in the program. Sections 22.22(9) - (18) are renumbered accordingly. The amendment to §22.22(9) adds the word "students" so the phrase will say "for undergraduate students." The amendments to new §22.22(13) replaces the term "a person" with the term "a student" since this is the term used later in the rule. The amendments to new §22.22(14) replace the term "Initial award" with "Initial TEG" since this is the term used later in the rule and specify the meaning of "Initial" to mean the first TEG award the student ever received. Section 22.22(18), "Program Maximum," §22.22(20), "Regular Semester," §22.22(22), "State Fiscal Year," and §22.22(23), "Tuition Differential," are newly defined terms that have been added to assist the institutions in administering the program. The amendment to new §22.22(25) adds the term "student" to the definition of "Undergraduate." As proposed, the amendments to §22.23(a)(1) would have incorporated the conclusions in Texas Attorney General Opinion GA-0395, which indicated independent or private institutions have to be accredited by an entity that also accredits public institutions in order to meet the statutory requirement in Texas Education Code, §61.222 of meeting "the same standards and accreditation as public institutions." These amendments are no longer recommended. Amendments to §22.23(c)(3)(B)(iii) adds "refunds" to the types of activities for which an institution may be assessed a penalty if the refund is received after the deadline. The amendment to §22.24(1)(A) replaces "an academic year" with the new term "state fiscal year" since this is the term used throughout the rules. In §22.24(3)(A) and (B)(i), the proposed amendment replaces the term "person" with the term "student" for consistency throughout these rules. Section 22.24(3)(C) and (D) were proposed to distinguish the difference between undergraduates and graduates regarding the number of hours required for continuing in the TEG program. These new subsections are no longer recommended for adoption. The amendment in

§22.24(5) identifies the three types of degree programs (first associate's, baccalaureate, or graduate) that are acceptable for participation in the TEG program. The amendment in §22.24(7) adds language that requires the institution to have a statement on file verifying that the student has registered with the Selective Service System or is exempt from registration under federal law as required in Texas Education Code, §51.9095. The amendments in §22.25(a), (b), and (c) replace the terms "person," "academic year," "TEG for the first time," and "grant" with the new terms that have already been described. In §22.26, the amendment replaces the title "Hardship Provisions for Persons Awarded TEG for the first time on or after September 1, 2005" with the title "Hardship Provisions for Students Awarded an Initial TEG on or after September 1, 2005" for added consistency throughout the rules. In §22.26(a), the term "person" is replaced with the term "student," and new §22.26(a)(3) adds a third hardship condition to allow undergraduates who need less than 12 hours to complete a degree to qualify for a prorated grant award. In §§22.27(b)(1) and (b)(1)(B), the amendment clarifies that the TEG award amount is calculated each fiscal year and may not exceed the prescribed maximums during that year. Section 22.27(b)(2) expands eligibility to receive a grant on a pro-rated basis to students who are enrolled less than half time if they are due to graduate. In §22.27(c), the title "Program Maximum" is replaced with the newly defined term "Exceptional Need Award" and again, the new term "undergraduate student' replaces the term "undergraduate" for consistency. Also in §22.27(c), the amendments delete §22.27(c)(1), which is now redundant since "Program Maximum" is now defined in §22.22(18) and §22.27(c)(2), which is covered under the introductory sentence to §22.27(c) "Exceptional Need Award." Amendments in §22.27(e) clarify that a "Disbursement Limit" applies to either a single term or semester and incorporates the formula for calculating a student's maximum award amount. In §22.28 (Adjustment to Awards Made through Campus Based Processing), the amendment deletes the requirement that unused funds should be returned by "check." All institutions have the option to return funds through electronic funds transfer. Other amendments to §§22.28(1) and (2) have been made to clarify that institutions should use any released funds to re-award other students attending their institutions and must return any unused funds by the deadline. Section 22.28(3) was added to specify when refunds are or are not required. The amendments to §22.29 replace the title "Retroactive Disbursements" with the new title "Late Disbursements," and §22.29(b) describes procedures for awarding late disbursements to align TEG with the late disbursement procedures in the other grant programs. Amendments to §22.30(b) delete references to "encumbered funds" and reflect new procedures for reallocation. These new procedures specify that institutions must draw down their TEG funds on or before a specified date, or lose claim to these funds completely. Funds released in this way are subject to reallocation among other institutions.

The following comment was received regarding the amendments:

Comment: Coordinating Board staff recommended that the definition of "Full-time enrollment" in §22.22(11) be amended to say "undergraduate students" rather than "undergraduates." This will match the amendment made to the definition of "Enrollment on at least a half-time basis" in §22.22(9).

Response: The Coordinating Board agreed and §22.22(11) was changed to say "undergraduate students."

Comment: Coordinating Board staff noticed that the amendment to §22.22(5) to change the definition of "Degree or certification program of four years or less" is not needed.

Response: The Coordinating Board agreed and did not change §22.22(5).

Comment: Coordinating Board staff noticed that the amendments to §22.23(a)(1) are not needed.

Response: The Coordinating Board agreed and did not change §22.23(a)(1).

Comment: Coordinating Board staff determined that §22.24(3)(C) and (D) are redundant to wording in §22.26, relating to hardship provisions, and recommended that §22.24(3)(C) and (D) not be adopted.

Response: The Coordinating Board agreed and did not recommend adopting §22.24(3)(C) and (D).

The amendments are adopted under the Texas Education Code, §61.229 which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §§61.221 - 61.230.

§22.22. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Awarded--Offered to a student.

(2) Board--The Texas Higher Education Coordinating Board.

(3) Commissioner--The Commissioner of Higher Education, the Chief Executive Officer of the Board.

(4) Cost of attendance--A Board-approved estimate of the expenses incurred by a typical financial aid student in attending a particular college or university. It includes direct educational costs (tuition, fees, books, and supplies) as well as indirect costs (room and board, transportation, and personal expenses).

(5) Degree or certificate program of four years or less--A baccalaureate degree or certificate program other than in architecture, engineering or any other program determined by the Board to require more than four years to complete.

(6) Degree or certificate program more than four years--A baccalaureate degree or certificate program in architecture, engineering or any other program determined by the Board to require more than four years to complete.

(7) Disbursement date--The date on which the Board generates a voucher requesting a grant disbursement for an institution.

(8) Exceptional financial need--The need an undergraduate student has if his or her expected family contribution is less than or equal to $1,000.

(9) Enrollment on at least a half-time basis--For undergraduate students, enrolled for the equivalent of six or more semester credit hours. For graduate students, enrolled for the equivalent of 4.5 or more semester credit hours.

(10) Expected family contribution--The amount of discretionary income that should be available to a student from his or her resources and that of his or her family, as determined following the federal methodology.

(11) Full-time enrollment--For undergraduate students, enrollment for the equivalent of twelve or more semester credit hours. For graduate students, enrollment for the equivalent of nine or more semester credit hours.

(12) Financial need--The cost of attendance at a particular public or private institution of higher education less the expected family contribution. The cost of attendance and family contribution are to be determined in accordance with Board guidelines.

(13) Graduate student--A student who has been awarded a baccalaureate degree.

(14) Initial TEG--The first Tuition Equalization Grant ever awarded to a specific student.

(15) Period of enrollment--The term or terms within a state fiscal year (September 1-August 31) for which the student was enrolled in an approved institution and met all the eligibility requirements for an award through this program.

(16) Private or independent institution--Any college or university defined as a private or independent institution of higher education by Texas Education Code, §61.003.

(17) Program or TEG--The Tuition Equalization Grant Program.

(18) Program Maximum--The TEG Program award maximum determined by the Board in accordance with Texas Education Code, §61.227 (relating to Payment of Grant; Amount).

(19) Program Officer--The individual named by each participating institution's chief executive officer to serve as agent for the Board. The Program Officer has primary responsibility for all ministerial acts required by the program, including maintenance of all records and preparation and submission of reports reflecting program transactions. Unless otherwise indicated by the administration, the director of student financial aid shall serve as Program Officer.

(20) Regular Semester--A fall or spring semester, typically of 16 weeks' duration.

(21) Resident of Texas--A resident of the State of Texas as determined in accordance with Chapter 21, Subchapter B, of this title (relating to Determining Residence Status). Nonresident students who are eligible to pay resident tuition rates are not residents of Texas.

(22) State Fiscal Year--A period of time that begins on September 1 of one calendar year and ends on August 31 of the following calendar year.

(23) Tuition Differential--The difference between the tuition paid at the private or independent institution attended and the tuition the student would have paid to attend a comparable public institution.

(24) Tuition Equalization Grant need (TEG need)--The total amount of TEG funds that full-time students at an approved institution would be eligible to receive if the program were fully funded.

(25) Undergraduate student--An individual who has not yet received a baccalaureate degree.

§22.23. Institutions.

(a) Eligibility.

(1) Any college or university defined as a private or independent institution of higher education by Texas Education Code, §61.003, or that is located in Texas and meets the same program standards and accreditation as public institutions of higher education as determined by the Board, except theological or religious seminaries, are eligible to participate in the TEG Program.

(2) No institution may, on the grounds of race, color, national origin, gender, religion, age, or disability exclude an individual from participation in, or deny the benefits of the program described in this subchapter.

(3) Each participating institution must follow the Civil Rights Act of 1964, Title VI (Public Law 88-353) in avoiding discrimination in admissions.

(b) Approval.

(1) Agreement. Each approved institution must enter into an agreement with the Board, the terms of which shall be prescribed by the Commissioner.

(2) Approval Deadline. An institution must be approved by April 1 in order for qualified students enrolled in that institution to be eligible to receive grants in the following fiscal year.

(c) Responsibilities.

(1) Probation Notice. If the institution is placed on public probation by its accrediting agency, it must immediately notify the Board and advise grant recipients of this condition and maintain evidence in each student's file to demonstrate that the student was so informed.

(2) Disbursements to Students.

(A) Documentation. The institution must maintain records to prove the receipt of program funds by the student or the crediting of such funds to the student's school account.

(B) Procedures in Case of Illegal Disbursements. If the Commissioner has reason for concern that an institution has disbursed funds for unauthorized purposes, the Board will notify the institution and offer an opportunity for a hearing pursuant to the procedures outlined in Chapter 1 of this title (relating to Agency Administration). Thereafter, if the Board determines that funds have been improperly disbursed, the institution shall become primarily responsible for restoring the funds to the Board. No further disbursements of grants or scholarships shall be permitted to students at that institution until the funds have been repaid.

(3) Reporting.

(A) Requirements/Deadlines. All institutions must meet Board reporting requirements in a timely fashion.

(i) Such reporting requirements shall include reports specific to allocation and reallocation of grant funds (including the Financial Aid Database Report) as well as progress and year-end reports of program activities.

(ii) Each participating institution shall have its TEG Program operations audited on a regular basis by an independent auditor or by an internal audit office that is independent of the financial aid and disbursing offices. Reports on findings and corrective action plans (if necessary) are due to the Board by April 15 each year for institutions on annual audit schedules, and every other April 15 for institutions on biannual audit cycles. Biannual reports must cover operations for the prior two years.

(B) Penalties for Late Reports and/or Late Refunds.

(i) An institution that postmarks or electronically submits a progress report a week or more after its due date will be ineligible to receive additional funding through the reallocation occurring at that time.

(ii) The Commissioner may penalize an institution by reducing its allocation of funds in the following year by up to 10 percent for each report that is postmarked or submitted electronically more than a week late. The penalty may also be invoked if the report is timely, but refunds owed to the Program by the institution are not made to the Board or the State Comptroller's Office within one week after due.

(iii) The Commissioner may assess more severe penalties against an institution if any report or refund is received by the Board more than one month after its due date. The Commissioner may penalize an institution by reducing its allocation of funds in the following year by up to 10 percent for each late refund of grant funds. If grant funds are returned more than a week after the announced return date, they will be considered late.

(iv) The maximum penalty for a single year is 30 percent of the school's allocation. If penalties are invoked in two consecutive years, the institution may be penalized an additional 20 percent.

(C) Appeal of Penalty. If the Commissioner determines that a penalty is appropriate, the institution will be notified by certified mail, addressed to the Program Officer and copied to the Financial Aid Director. Within 21 days from the time that the Program Officer receives the written notice, the institution must submit a written response appealing the Board's decision, or the penalty shall become final and no longer subject to an appeal. An appeal under this section will be conducted in accordance with the rules provided in Chapter 1 of this title (relating to Agency Administration).

(4) Program Reviews. If selected for such by the Board, participating institutions must submit to program reviews of activities related to the TEG Program.

§22.24. Eligible Students.

To receive an award through the TEG Program, a student must:

(1) be enrolled for a minimum number of semester credit hours, which requires:

(A) if the student received a TEG in a state fiscal year prior to 2005 - 2006 or was awarded a TEG for the 2005 - 2006 state fiscal year prior to September 1, 2005, enrollment on at least a half-time basis; or

(B) if the student was awarded his or her initial TEG award on or after September 1, 2005, full-time enrollment;

(2) show financial need;

(3) maintain satisfactory academic progress in his or her program of study which requires:

(A) if the student received a TEG in a state fiscal year prior to 2005 - 2006 or was awarded a TEG for the 2005 - 2006 state fiscal year prior to September 1, 2005, the student must meet the academic progress requirements as set by the institution; or

(B) if the student was awarded his or her initial TEG award on or after September 1, 2005:

(i) completion of at least 24 semester credit hours in the student's most recent academic year in an undergraduate degree or certificate program; or completion of at least 18 semester credit hours in the student's most recent academic year in a graduate or professional degree program (unless fewer hours are required for the completion of the degree), and

(ii) establishment and maintenance of an overall grade point average of at least 2.5 on a four-point scale or the equivalent on coursework previously attempted at public or private institutions. Grade point average calculations shall be made in accordance with institutional policies except that if a grant recipient's grade point average falls below program requirements and the student transfers to another institution, the receiving institution cannot make a continuation award to the transfer student until he/she provides official transcripts of previous coursework to the new institution's financial aid office and that office re-calculates an overall grade point average, including hours and grade points for courses taken at the old and new institutions that proves the student's overall grade point average now meets or exceeds program requirements.

(4) be a resident of Texas, unless such student is a national merit scholarship finalist;

(5) be enrolled in an approved institution in an individual degree plan leading to a first associate's degree, baccalaureate degree or a graduate degree;

(6) be required to pay more tuition than is required at a comparable public college or university and be charged no less than the regular tuition required of all students enrolled at the institution;

(7) have a statement on file with the institution indicating the student is registered with the Selective Service System as required by federal law or is exempt from Selective Service registration under federal law; and

(8) not be a recipient of any form of athletic scholarship during the semester or semesters he or she is receiving a TEG.

§22.25. End of Eligibility.

(a) A student awarded TEG prior to the 2005 - 2006 state fiscal year or before September 1, 2005, for the 2005 - 2006 state fiscal year may continue to receive grants as long as he or she meets the relevant eligibility requirements of §22.24 of this title (relating to Eligible Students).

(b) An undergraduate student who is awarded an initial TEG on or after September 1, 2005, shall not be eligible for a TEG on either:

(1) the fifth anniversary of the initial award of a TEG to the student, if the student is enrolled in a degree or certificate program of four years or less; or

(2) the sixth anniversary of the initial award of a TEG to the student, if the student is enrolled in a degree or certificate program of more than four years.

(c) A graduate student who is awarded an initial TEG on or after September 1, 2005, may continue to receive grants as long as he or she meets the relevant eligibility requirements of §22.24 of this title.

§22.26. Hardship Provisions for Students Awarded an Initial TEG on or after September 1, 2005.

(a) In the event of a hardship or for other good cause, the Program Officer at an eligible institution may allow an otherwise eligible student to receive a TEG while enrolled less than full time or if the student's grade point average or number of hours completed falls below the satisfactory academic progress requirements as referred to in §22.24 of this title (relating to Eligible Students). Such conditions may include, but are not limited to:

(1) a showing of a severe illness or other debilitating condition that may affect the student's academic performance;

(2) an indication that the student is responsible for the care of a sick, injured, or needy person and that the student's provision of care may affect his or her academic performance, or

(3) an undergraduate student's need to complete fewer than 12 hours in a given term in order to complete a degree, in which case the award amount should be determined on a pro rata basis for a full-time award.

(b) Each institution shall adopt a hardship policy under this section and have the policy available in writing in the financial aid office for public review upon request.

§22.27. Award Amounts and Uses.

(a) Funding. Funds awarded through this program may not exceed the amount appropriated by the Legislature for that purpose.

(b) Award Amount.

(1) Each state fiscal year, no TEG award shall exceed the least of:

(A) the student's financial need;

(B) the student's tuition differential; or

(C) the program maximum.

(2) A grant to a part-time student whose initial TEG was awarded prior to September 1, 2005 or to any student enrolled for a limited number of hours due to imminent graduation shall be made on a pro rata basis of a full-time award.

(c) Exceptional Need Award. An undergraduate student who has exceptional financial need may receive a grant in an amount not to exceed 150 percent of the program maximum.

(d) Uses. No grant disbursed to a student may be used for any purpose other than for meeting the cost of attending an approved institution.

(e) Term or Semester Disbursement Limit. The amount of any disbursement in a single term or semester may not exceed the student's financial need, tuition differential or the program maximum for the state fiscal year, whichever is the least.

(f) Over Awards. If, at a time after an award has been offered by the institution and accepted by the student, the student receives assistance that was not taken into account in the student's estimate of financial need, so that the resulting sum of assistance exceeds the student's financial need, the institution is not required to adjust the award under this program unless the sum of the excess resources is greater than $300.

§22.28. Adjustments to Awards Made through Campus-Based Processing.

If a student officially withdraws from enrollment, or for some other reason, the amount of a student's disbursement exceeds the amount the student is eligible to receive, the institution shall follow its general institutional refund policy in determining the amount by which the award is to be reduced.

(1) Such funds should be re-awarded to other eligible students attending the institution. If funds cannot be re-awarded in a timely manner, they should be returned to the Board. Such payment shall be accompanied with sufficient documentation to enable the Board to identify the appropriate program for which the funds were originally issued.

(2) Funds returned to the Board shall be returned promptly, and must be returned no later than 60 days from the issue date.

(3) If the student withdraws or drops classes after the end of the institution's refund period, no refunds are due to the program.

§22.29. Late Disbursements.

(a) A student may receive a disbursement after the end of his/her period of enrollment if the student:

(1) Owes funds to the institution for the period of enrollment for which the award is being made; or

(2) Received a student loan that is still outstanding for the period of enrollment.

(b) Funds that are disbursed after the end of the student's period of enrollment must be used following Board procedures to either pay the student's outstanding balance from his/her period of enrollment at the institution or to make a payment against an outstanding student loan received during that period of enrollment. Under no circumstances are funds to be released to the student.

§22.30. Allocation and Reallocation of Funds.

(a) Allocations. Available program funds will be allocated to each participating institution in proportion to each institution's TEG need.

(b) Reallocations. Institutions will have until a date specified by the Board via a policy memo addressed to the Program Officer at the institution to encumber the program funds that have been allocated to them. On that date, institutions lose claim to any funds not yet drawn down from the Board for immediate disbursement to students. The funds released in this manner are available to the Board for reallocation to other institutions. If necessary for ensuring the full use of funds, subsequent reallocations may be scheduled until all funds are awarded and disbursed.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 1, 2008.

TRD-200802320
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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Proposal publication date: February 29, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER C. PROVISIONS FOR THE LEVERAGING EDUCATIONAL ASSISTANCE GRANT FOR STUDENTS AT INDEPENDENT INSTITUTIONS

19 TAC §22.41, §22.42

The Texas Higher Education Coordinating Board adopts the repeal of §22.41 and §22.42, concerning the Provisions for the Leveraging Educational Assistance Grant for Students at Independent Institutions, without changes to the proposal as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1710).

Specifically, this repeal will delete current Chapter 22, Subchapter C, concerning the Provisions for the Leveraging Educational Assistance Grant for Students at Independent Institutions, and all sections within it. The program is governed by federal regulations and state rules are not needed.

No comments were received regarding the repeal.

The repeal is adopted under the Texas Education Code, §61.229, which provides the Coordinating Board with the authority to adopt rules necessary to implement the Tuition Equalization Grant Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER F. PROVISIONS FOR THE SCHOLARSHIP PROGRAMS FOR VOCATIONAL NURSING STUDENTS

19 TAC §§22.102, 22.105, 22.107, 22.108

The Texas Higher Education Coordinating Board adopts amendments to §§22.102, 22.105, 22.107 and 22.108 concerning Provisions for the Scholarship Programs for Vocational Nursing Students. Sections 22.102 and 22.105 are adopted with changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1711) and will be republished. Sections 22.107 and 22.108 are adopted without changes to the proposed text as published in the February 29, 2008, issue and will not be republished.

Specifically, the amendments to §22.102(8) correct the title of Subchapter B referenced in the definition of "Resident of Texas" to the full title "Determination of Residence Status and Waiver Programs for Certain Nonresident Persons." The amendments to §22.105(a)(4) and (5) add a requirement that the student must have a statement on file with the institution that verifies that the student has registered with the selective service or is exempt from registration under federal law as required in Texas Education Code, §51.9095. Section 22.105(b) changes responsibility for determining the ranking criteria for selecting scholarship applicants from the Board to the institutions. The amendment to §22.107 reflects the conversion of the programs from a central process (awards are determined at the Board) to one that is campus-based (awards are made at the institutions) and allocates program funds to institutions according to their percentage of vocational nursing student enrollment statewide. The amendment to §22.108 deletes procedures for submitting applications to the Board through a central processing system and adds procedures for requesting and disbursing funds through a campus-based processing system.

The following comments were received regarding the amendments:

Comment: Staff noticed that the reference to the advisory committee in §22.105(b) should be changed from §22.112 to §22.110.

Response: The Coordinating Board agrees and recommends that the reference to the advisory committee in §22.105(b) be amended to cite §22.110.

The amendments are adopted under the Texas Education Code, §61.656, which provide the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, Chapter 61, Subchapter L.

§22.102. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education, the Chief Executive Officer of the Board.

(3) Cost of attendance--A Board-approved estimate of the expenses incurred by a typical financial aid student in attending a particular college or university. It includes direct educational costs (tuition, fees, books, and supplies) as well as indirect costs (room and board, transportation, and personal expenses).

(4) Expected family contribution--The amount of discretionary income that should be available to a student from his or her resources and that of his or her family, as determined following the federal methodology.

(5) Financial need--The cost of attendance at a particular public or private institution of higher education less the expected family contribution. The cost of attendance and family contribution are to be determined in accordance with Board guidelines.

(6) Half-time student--For undergraduates, enrollment for the equivalent of six or more semester credit hours. For graduate students, enrollment for the equivalent of 4.5 or more semester credit hours.

(7) Program Officer--The individual named by each participating institution's chief executive officer to serve as agent for the Board. The Program Officer has primary responsibility for all ministerial acts required by the program, including maintenance of all records and preparation and submission of reports reflecting program transactions. Unless otherwise indicated by the administration, the director of student financial aid shall serve as Program Officer.

(8) Resident of Texas--A resident of the State of Texas as determined in accordance with Chapter 21, Subchapter B of this title (relating to Determination of Residence Status and Waiver Programs for Certain Nonresident Persons). Nonresident students who are eligible to pay resident tuition rates are not residents of Texas.

(9) Rural--Located in a non-metropolitan area as defined by the United States Census Bureau in its most recent census.

(10) Vocational Nursing Student--A student enrolled in a nonprofit school or program that is preparing the student for licensure as a licensed vocational nurse.

§22.105. Eligible Students.

(a) To receive funds through one of the Vocational Nursing Student Scholarship Programs, a student must:

(1) be a resident of Texas;

(2) be enrolled in a vocational nursing program on at least a half-time basis at an approved institution;

(3) show financial need, which acts as one of the upper limits of a student's award through the program;

(4) maintain satisfactory academic progress in his or her program of study as defined by the institution; and

(5) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from Selective Service registration under federal law.

(b) In determining what best promotes the health care and educational needs of this State, the institution shall consider the following factors relating to each applicant. The importance to be given each factor will be determined by the Board in consultation with the advisory committee described in §22.110 of this title (relating to Advisory Committee).

(1) scholastic ability and performance as measured for entering freshmen by high school grade point average, rank and scores on standardized college entrance examination, and for continuing or transfer college students by college grade point average;

(2) financial need;

(3) whether the person is receiving Temporary Assistance for Needy Families or participates in another public welfare program;

(4) employment by a state agency; and

(5) whether the person, at the time of application to participate in the scholarship program is likely to practice in an area with an acute nursing shortage.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 1, 2008.

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Bill Franz
General Counsel
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For further information, please call: (512) 427-6114

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19 TAC §§22.109 - 22.113

The Texas Higher Education Coordinating Board adopts the repeal of §§22.109 - 22.113, concerning Provisions for the Scholarship Programs for Vocational Nursing Students, without changes to the proposal as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1712).

Specifically, §22.109 and §22.111 are deleted because the described procedures are no longer relevant. Sections 22.110, 22.112 and 22.113 are being renumbered.

No comments were received regarding the repeal.

The repeal is adopted under the Texas Education Code, §61.656, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, Chapter 61, Subchapter L.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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19 TAC §§22.109 - 22.111

The Texas Higher Education Coordinating Board adopts new §§22.109 - 22.111, concerning Provisions for the Scholarship Programs for Vocational Nursing Students, without changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1712).

Specifically, the deletion of two sections necessitates the renumbering and creation of the new sections. The new sections will provide procedures for retroactive disbursements, the establishment of an advisory committee, and the dissemination of information and rules.

No comments were received regarding the new sections.

The new sections are adopted under the Texas Education Code, §61.656, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, Chapter 61, Subchapter L.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER G. PROVISIONS FOR THE SCHOLARSHIP PROGRAMS FOR PROFESSIONAL NURSING STUDENTS

19 TAC §§22.122, 22.123, 22.125, 22.127, 22.128

The Texas Higher Education Coordinating Board adopts amendments to §§22.122, 22.123, 22.125, 22.127 and 22.128 concerning Provisions for the Scholarship Programs for Professional Nursing Students. Section 22.125 and §22.127 are adopted with changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1713). Sections 22.122, 22.123, and 22.128 are adopted without changes and will not be republished.

Specifically, the amendments to §22.122(9) correct the title of Subchapter B referenced in the definition of "Resident of Texas" to the full title "Determination of Resident Status and Waiver Programs for Certain Nonresident Persons." The amendment

to §22.123(a)(2) clarifies that "participating" institutions may not discriminate against individuals wishing to participate in the program on the basis of race, color, origin, gender, religion, age or disability. The amendments to §22.125(a)(5) and (6) add a requirement that the student must have a statement on file with the institution that verifies that the student has registered with the selective service or is exempt from registration under federal law as required in Texas Education Code, §51.9095. Section 22.125(b) changes responsibility for determining the ranking criteria for selecting scholarship applicants from the Board to the institutions. The amendment to §22.127 reflects the conversion of the program from a central process (awards are determined at the Board) to one that is campus-based (awards are made at the institutions) and allocates program funds to institutions according to their percentage of professional nursing student enrollment statewide. The amendment to §22.128 deletes procedures for submitting applications to the Board through a central processing system and adds procedures for requesting and disbursing funds through a campus-based processing system.

The following comments were received regarding the amendments:

Comment: Staff noticed that the reference to the advisory committee in §22.125(b) should be changed from §22.132 to §22.130.

Response: The Coordinating Board agrees and recommends that the reference to the advisory committee in §22.125(b) be amended to cite §22.130.

The amendments are adopted under the Texas Education Code, §61.656, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, Chapter 61, Subchapter L.

§22.125. Eligible Students.

(a) To receive funds through one of the Professional Nursing Student Scholarship Programs, a student must:

(1) be a resident of Texas;

(2) be enrolled on at least a half-time basis at an approved institution;

(3) show financial need, which acts as one of the upper limits of a student's award through the program;

(4) maintain satisfactory academic progress in his or her program of study as defined by the institution;

(5) be enrolled in a professional nursing program and, (if applying for an award through the Scholarship Program for Licensed Vocational Nurses studying to become Professional Nurses), be a Licensed Vocational Nurse; and

(6) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from Selective Service registration under federal law.

(b) In determining what best promotes the healthcare and educational needs of this State, the institution shall consider the following factors relating to each applicant. The importance to be given each factor will be determined by the Board in consultation with the advisory committee described in §22.130 of this title (relating to Advisory Committee).

(1) scholastic ability and performance as measured for entering freshmen by high school grade point average, rank and scores on standardized college entrance examination, and for continuing or transfer college students by its college grade point average;

(2) geographical area of intended nursing practice;

(3) financial need;

(4) whether the person is receiving Temporary Assistance for Needy Families or participates in an other public welfare program;

(5) employment by a state agency;

(6) employment on a nursing school faculty of an eligible institution; and

(7) whether the person at the time of application to participate in the scholarship program is a practicing nurse in an area with an acute nursing shortage or is likely to practice in such an area.

§22.127. Allocations.

Each participating institution will receive a share of the program funds based on its share of the statewide relevant professional nursing student enrollment. Funds allocated to institutions may be used to make awards through any of the programs established by this subchapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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19 TAC §§22.129 - 22.133

The Texas Higher Education Coordinating Board adopts the repeal of §§22.129 - 22.133, concerning Provisions for the Scholarship Programs for Professional Nursing Students, without changes to the proposal as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1714).

Specifically, §22.129 and §22.131 are deleted because the described procedures are no longer relevant. Sections 22.130, 22.132 and 22.133 are being renumbered.

No comments were received regarding the repeal.

The repeal is adopted under the Texas Education Code, §61.656, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, Chapter 61, Subchapter L.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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19 TAC §§22.129 - 22.131

The Texas Higher Education Coordinating Board adopts new §§22.129 - 22.131, concerning Provisions for the Scholarship Programs for Professional Nursing Students, without changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1715).

Specifically, the repeal of two sections necessitates the renumbering and creation of the new sections. The new sections will provide procedures for retroactive disbursements, the establishment of an advisory committee, and the dissemination of information and rules.

No comments were received regarding the new sections.

The new sections are adopted under the Texas Education Code, §61.656, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, Chapter 61, Subchapter L.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER J. PROVISIONS FOR THE TEXAS TUITION ASSISTANCE GRANT PROGRAM

19 TAC §§22.181 - 22.186

The Texas Higher Education Coordinating Board adopts the repeal of §§22.181 - 22.186, concerning the Provisions for the Texas Tuition Assistance Grant Program, without changes to the proposal as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1716).

Specifically, the repeal will delete current Chapter 22, Subchapter J, concerning the Provisions for the Texas Tuition Assistance Grant Program, and all sections within it. Beginning in Fiscal Year 2002, funding was limited to renewal students only and remaining funds transferred to the Texas Grant program. The program has since been phased out.

No comments were received regarding the repeal.

The repeal is adopted pursuant to House Bill 713, 76th Texas Legislature, in 1999 repealed Subchapter G, §§56.101 - 56.108 of the Texas Education Code, Texas Tuition Assistance Grant Program, but required the Coordinating Board to continue funding renewal students. There are no longer any students in the program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER L. TOWARD EXCELLENCE, ACCESS, AND SUCCESS (TEXAS) GRANT PROGRAM

19 TAC §§22.226, 22.228, 22.229, 22.231, 22.235, 22.236

The Texas Higher Education Coordinating Board adopts amendments to §§22.226, 22.228, 22.229, 22.231, 22.235, and 22.236, concerning the Toward EXcellence, Access, and Success (TEXAS) Grant Program. Section 22.226 and 22.231 are adopted with changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1716). Sections 22.228, 22.229, 22.235, and 22.236 are adopted without changes to the proposed text as published.

Specifically, the amendment to §22.226(a)(7) eliminates the definition of "encumbered funds," a term no longer relevant to the administration of the program. The remaining definitions are renumbered accordingly. The amendments to §22.228 include a change to §22.228(a)(1) to eliminate the specific reference to the core residency questions, since students may prove residency through the use of other documents, such as the common application for admission. The addition of §22.228(a)(8) reflects state selective service registration requirements (Texas Education Code §51.9095) for receiving state aid. The addition of §22.228(a)(9) reflects a more specific financial need requirement for initial awards that is used when funding for the TEXAS Grant program is limited. The amendment to §22.228(b)(3) cross-references the existence of a hardship provision that can allow continuing students enrolled less than three-quarters time to receive awards, and §22.228(b)(6) is added to reflect the selective service registration requirement for continuing recipients. Amendments to §22.229(b)(1) and (2) cross-reference the existence of hardship provisions that can allow students to continue to receive awards under certain hardship conditions. New §22.231(e) was proposed to clarify that a student enrolled only one semester in a given academic year can meet program academic progress requirements for continuing in the program if he or she completes at least 12 semester credit hours during that term. This new subsection is no longer recommended for adoption. Amendments to §22.235 clarify that "retroactive disbursements" are awards made after the end of a student's period of enrollment. Amendments to §22.236 clarify that as of the annual deadline specified by the Board, an institution that has not yet drawn down its full annual allocation of funds for disbursement to students will lose

claim to the left over funds, which will be reallocated to other institutions. This deadline (March 1 for Fiscal Year 2008) is used to ensure the full use of funds.

The following comment was received regarding the amendments:

Comment: Coordinating Board staff determined that §22.231(e) is redundant to other wording in §22.231, relating to hardship provisions, and recommended that §22.231(e) not be adopted.

Response: The Coordinating Board agreed and did not recommend adopting §22.231(e).

The amendments are adopted under the Texas Education Code, §56.303, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §§56.301 - 56.311.

§22.226. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Awarded--Offered to a student.

(2) Board--The Texas Higher Education Coordinating Board.

(3) Commissioner--The Commissioner of Higher Education, the Chief Executive Officer of the Board.

(4) Cost of attendance--A Board-approved estimate of the expenses incurred by a typical financial aid student in attending a particular college. It includes direct educational costs (tuition, fees, books, and supplies) as well as indirect costs (room and board, transportation, and personal expenses).

(5) Degree or certificate program of four years or less--A baccalaureate degree or certificate program other than in architecture, engineering or any other program determined by the board to require four years or less to complete.

(6) Degree or certificate program of more than four years--A baccalaureate degree or certificate program in architecture, engineering or any other program determined by the board to require more than four years to complete.

(7) Enrolled on at least a three-quarter basis--Enrolled for the equivalent of nine semester credit hours in a regular semester.

(8) Entering undergraduate--A student enrolled in the first 30 semester credit hours or their equivalent, excluding hours taken during dual enrollment in high school and courses for which the student received credit through examination.

(9) Expected family contribution--The amount of discretionary income that should be available to a student from his or her resources and that of his or her family, as determined following the federal methodology.

(10) Financial need--The cost of attendance at a particular public or private institution of higher education less the expected family contribution. The cost of attendance and family contribution are to be determined in accordance with Board guidelines.

(11) Initial year award--The grant award made in the student's first year in the TEXAS Grant program, typically made up of a fall and spring disbursement.

(12) Institution of Higher Education or Institution--Any public technical institute, public junior college, public senior college or university, medical or dental unit or other agency of higher education as defined in Texas Education Code, §61.003(8).

(13) Period of enrollment--The term or terms within the current state fiscal year (September 1 - August 31) for which the student was enrolled in an approved institution and met all the eligibility requirements for an award through this program.

(14) Private or Independent Institution of Higher Education--Any college or university defined as a private or independent institution of higher education by Texas Education Code, §61.003(15).

(15) Program Officer--The individual named by each participating institution's chief executive officer to serve as agent for the Board. The Program Officer has primary responsibility for all ministerial acts required by the program, including maintenance of all records and preparation and submission of reports reflecting program transactions. Unless otherwise indicated by the administration, the director of student financial aid shall serve as Program Officer.

(16) Recommended or advanced high school programs--The curriculum specified in the Texas Education Code, §28.025, and the rules promulgated there under by the State Board of Education.

(17) Required fees--A mandatory fee (required by statute) or discretionary fee (authorized by statute, imposed by the governing board of an institution) that an institution charges to a student as a condition of enrollment at the institution or in a specific course.

(18) Resident of Texas--A resident of the State of Texas as determined in accordance with Chapter 21, Subchapter B of this title (relating to Determination of Resident Status and Waiver Programs for Certain Nonresident Persons). Nonresident students who are eligible to pay resident tuition rates are not residents of Texas.

(19) Tuition--Statutory tuition, designated and/or Board-authorized tuition.

§22.231. Hardship Provisions.

(a) In the event of a hardship or for other good cause, the Program Officer at an eligible institution may allow an otherwise eligible person to receive a TEXAS Grant while enrolled for an equivalent of less than three-quarter time or if the student's grade point average or completion rate or number of completed hours falls below the satisfactory academic progress requirements of §22.229 of this title (relating to Satisfactory Academic Progress). Such conditions are not limited to, but include:

(1) a showing of a severe illness or other debilitating condition that may affect the student's academic performance;

(2) an indication that the student is responsible for the care of a sick, injured, or needy person and that the student's provision of care may affect his or her academic performance; or

(3) the requirement of fewer than nine hours to complete one's degree plan.

(b) The director of financial aid may grant an extension of the year limits found in §22.230 of this title (relating to Discontinuation of Eligibility or Non-Eligibility) in the event of hardship. Documentation justifying the extension must be kept in the student's files, and the institution must identify students granted extensions and the length of their extensions to the Coordinating Board, so that it may appropriately monitor each student's period of eligibility.

(c) The financial aid director may allow a student to receive his/her first award after more than 16 months have passed since high school graduation if the student and/or the student's family has suffered a hardship that would now make the student rank as one of the institu-

tion's neediest. Documentation justifying the exception must be kept in the student's files.

(d) Each institution shall adopt a hardship policy under this section and have the policy available in writing in the financial aid office for public review upon request.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER M. TEXAS EDUCATIONAL OPPORTUNITY GRANT PROGRAM

19 TAC §§22.254, 22.256, 22.260

The Texas Higher Education Coordinating Board adopts amendments to §§22.254, 22.256, and 22.260, concerning the Texas Educational Opportunity Grant Program, without changes to the proposed text as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1718).

Specifically, the amendments to §22.254(15) clarifies the cross-reference of the Board rules for determining residency and corrects the title of Subchapter B referenced in the definition of "Resident of Texas" to the full title: "Determination of Residence Status and Waiver Programs for Certain Nonresident Persons." The amendments to §22.256(a)(6) and (7) and §22.256(b)(6) and (7) provide for an additional eligibility requirement for initial and continuing students: a statement from the student must be on file with the institution verifying that he or she has registered with the selective service or is exempt from registration under federal law, as required in Texas Education Code, §51.9095. Section 22.256(b)(8) is re-numbered accordingly. The amendment to §22.260(b)(2) reflects the requirement that an institution may not make awards for amounts less than the maximum amount, except in the case of a student who is enrolled less than half-time, and describes the calculation for determining pro-rated award amounts.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §56.403, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §§56.401 - 56.4075.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 133. GENERAL MEDICAL PROVISIONS

SUBCHAPTER D. DISPUTE OF MEDICAL BILLS

28 TAC §§133.305, 133.307, 133.308

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance (Department), Division of Workers' Compensation (Division), adopts amendments to §§133.305, 133.307, and 133.308, concerning medical dispute resolution (MDR). The amendments are adopted with changes to the proposed text published in the December 14, 2007 issue of the *Texas Register* (32 TexReg 9257).

In addition to the publication of the proposal on December 14, 2007, a correction of error notice was published in the December 28, 2007 issue of the *Texas Register* (32 TexReg 10110) to correct a typographical error in the preamble of the proposed rule; the correction of error did not pertain to any proposed amendments to the rule text.

The amendments are necessary to implement statutory provisions of House Bill (HB) 724, HB 1003, and HB 2004 enacted by the 80th Legislature, Regular Session, effective September 1, 2007; and to clarify provisions of and ensure compliance with fee payment to independent review organizations (IROs). The amendments incorporate administrative-level hearings into the Division's MDR process as a step between MDR or IRO review and judicial review in resolution of medical fee and medical necessity disputes. The amendments also address licensing and professional specialty requirements for doctors performing reviews for IROs.

Changes to the Labor Code by HB 724 introduce the State Office of Administrative Hearings (SOAH) and the Division's contested case hearing process into the MDR process as a level of appeal that occurs after MDR or IRO review and prior to judicial review. Changes to the Labor Code by HB 1003 require IROs that use doctors to perform reviews of health care services provided under the Texas Workers' Compensation Act to only use doctors licensed to practice in Texas to perform the reviews. Changes to the Labor Code by HB 2004 require a doctor performing an independent review of a health care service provided to an injured employee, including a retrospective review, who reviews a specific workers' compensation case, to hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving.

Prior to September 1, 2005, the Division's MDR process allowed a party to appeal a decision to SOAH prior to judicial review. In order to shorten the appeal process, HB 7, enacted by the 79th Legislature, Regular Session, amended Labor Code §413.031 to remove appeals to SOAH from the MDR process. In compliance with the revision to the code, the Division revised its rules to reflect the change. On November 1, 2006, a Travis County District Court determined in *HCA Healthcare Corp. v. Texas Dept. Insurance and Division of Workers' Compensation,* Cause No. D-1-GN-06-000176, that the MDR process as revised by HB 7 did not provide due process to parties and found subsection (k) of Labor Code §413.031 to be facially unconstitutional. The District Court judgment remains pending upon appeal to the Third Court of Appeals in Austin under Docket No. 03-07-0007-CV. During the 80th Legislative Session, the Texas Legislature enacted HB 724, which amended Labor Code §413.031(k) and added Labor Code §§413.031(k-1) - (k-2) and 413.0311.

Labor Code §413.031(k), (k-1), and (k-2) is applicable to a party to a medical dispute that is not subject to Labor Code §413.0311 or party to a dispute regarding spinal surgery subject to Labor Code §413.031(l). Under Labor Code §413.031(k), (k-1) and (k-2), a party is entitled to a hearing before SOAH for any dispute that remains unresolved after MDR or IRO review. A party aggrieved by a final decision of SOAH may seek judicial review conducted in the manner provided for judicial review of a contested case under Subchapter G, Chapter 2001 of the Texas Government Code.

Labor Code §413.0311 is applicable to a party to a medical fee dispute in which the amount sought in reimbursement does not exceed $2,000, a party appealing an IRO decision regarding determination of the retrospective medical necessity for a health care service for which the amount billed does not exceed $3,000, and a party appealing an IRO decision regarding determination of the concurrent or prospective medical necessity for a health care service. Under Labor Code §413.0311, a party is entitled to a contested case hearing for any dispute that remains unresolved after medical fee or medical necessity review. Hearings under Labor Code §413.0311 are to be conducted by a hearings officer in the manner provided for contested case hearings under Subchapter D, Chapter 410 of the Labor Code; however, a benefit review conference is not a prerequisite for a contested case hearing under Labor Code §413.0311.

HB 1003 amends Labor Code §413.031 by adding subsection (e-2), which provides that an IRO that uses doctors to perform reviews of health care services provided under this title may only use doctors licensed to practice in this state.

HB 2004 adds Labor Code §§408.0043 - 408.0045 to the Labor Code. Labor Code §408.0043 provides that a doctor, other than a dentist or chiropractor, who reviews a specific workers' compensation case regarding a health care service provided to an injured employee must hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving. Labor Code §408.0044 provides that a dentist who reviews a dental service provided in conjunction with a specific workers' compensation case must be licensed to practice dentistry. Labor Code §408.0045 provides that a chiropractor who reviews a chiropractic service provided in conjunction with a specific workers' compensation case must be licensed to engage in the practice of chiropractic.

Non-substantive changes based on comments were made to the proposed rule text at §133.307(a), (c)(2)(A), (c)(3)(C), (d)(2)(A)(i), (d)(2)(A)(ii), (d)(3)(A), (e)(3)(J), (f)(2)(A), (f)(2)(C), and (f)(2)(D); and §133.308(a), (d), (g)(1), (i), (l)(2), (l)(3), (t), (t)(1)(B)(i), (t)(1)(B)(ii), and (t)(1)(B)(v) - (vii).

In regard to proposed §133.307(a) and §133.308(a) (both subsections relating to Applicability), some commenters expressed concern that the proposed sections would be inappropriately made applicable to situations not covered by the controlling statutes on which the rules are based. The Division agrees in part and disagrees in part with the comments. In response to the comments, the Division has clarified that the purpose of the proposed applicability provisions was to make the proposed sections applicable only to disputes expressly addressed in the applicability provisions of HB 724. The Division recognizes that not all the amendments in the proposed sections were based on HB 724; some proposed amendments were based on provisions of Labor Code §413.031 that were not amended by HB 724, and some proposed amendments were based on HB 1003 or HB 2004. In response to the concerns voiced in comments, the Division adopts language in §133.307(a) that makes the section generally applicable to requests for medical fee dispute resolution for non-network or certain authorized out-of-network health care not subject to a contract, that is remanded to the Division or filed on or after May 25, 2008, and the Division adopts language in §133.308(a) that makes the section generally applicable to the independent review of network and non-network preauthorization, concurrent, or retrospective medical necessity disputes that is remanded to the Division or filed on or after May 25, 2008. However, Labor Code §413.031 as amended by HB 724 and Labor Code §413.0311 as added by HB 724 address situations in which there was no controlling law prior to HB 724, because the previous controlling statutory provision, Labor Code §413.031(k), was struck down as unconstitutional. HB 724, Section 9, contains explicit provisions concerning applicability of Labor Code §413.031 and Labor Code §413.0311, and the Division adopts in §133.307(a)(2) and §133.308(a)(2) those applicability provisions. In regard to applicability of §133.307(f) and §133.308(t)(1), the provisions in the rule that are based on Labor Code §413.031 as amended by HB 724 and Labor Code §413.0311 as added by HB 724.

In regard to proposed §133.307(c)(2)(A), a commenter expressed support for the provision, but recommended that the provision specify that electronic billing data be submitted in a format prescribed by the Division to avoid the data being filed using multiple formats. The Division agrees with this suggestion, and in response to the comment adopts language in §133.307(c)(2)(A) that states a request for medical fee dispute resolution shall include, "a copy of all medical bill(s), in a paper billing format using an appropriate DWC approved paper billing format . . . ."

In regard to proposed §133.307(c)(3)(C), some commenters objected to the amendment that would change the word "proof" to "documentation," and asked that this proposed amendment not be adopted. The commenters expressed concern that this amendment would reduce the burden of proof for a injured employee who requests dispute resolution. Additionally, some commenters suggested that additional items be added to the list in the parentheses at the end of the subparagraph, and one commenter suggested that the phrase "like documents" be changed to "similar documents." In response to the concern regarding the proposed change of "proof" to "documentation," the Division clarifies that §133.307(c)(3)(C) does not establish the burden of proof an injured employee must meet, but only lists the types of evidence an injured employee should provide to the Division in support of his or her claim. As such, changing the

word "proof" to "documentation" would not weaken an injured employee's burden. However, in response to the comments, the Division agrees. In regard to the suggested additional items, the Division clarifies that the list in §133.307(c)(3)(C) is not intended to be exhaustive, and explains that the suggested items might be relevant to a fee dispute proceeding. However, rather than adopting an extensive list, in response to the comment the Division has added the word "including" to the start of the list to clarify that the list is not exhaustive and that additional items might be provided to the Division as proof of injured employee payment. The Division agrees to adopt the phrase "similar documents" in lieu of the proposed phrase "like documents," to clarify that the list is not exhaustive.

In regard to proposed §133.307(d)(2)(A)(i) and (ii), a commenter requested clarification regarding the requirement for the carrier to provide copies of EOBs and medical bills "in a paper format;" the commenter asked whether the provision would allow a carrier to submit e-billing and payment data in a paper format of its choice. In response to the comment, the Division clarifies that paper formats used should be in a Division approved paper billing format. The Division also specifies in §133.307(d)(2)(A)(i) that initial and reconsideration EOBs should be submitted "in a paper explanation of benefits format using an appropriate DWC approved paper billing format," and similarly specifies in §133.307(d)(2)(A)(ii) that specifies that copies of medical bills should be submitted "in a paper billing format using an appropriate DWC approved paper billing format."

In regard to proposed §133.307(d)(3)(A), a commenter noted that the proposed provision would require a health care provider responding to a request for medical fee dispute resolution to include with its response copies of relevant medical bills in a paper billing format. The commenter suggested that the provision additionally specify that the paper billing format used be a format prescribed by the Division, in order to avoid confusion that could arise if the format were not specified. The Division agrees with the suggestion, and specifies in §133.307(d)(3)(A) that medical bills submitted under the paragraph should be submitted "in a paper billing format using an appropriate DWC approved billing format."

In regard to proposed §133.307(e)(3)(J), commenters expressed concern that the rule does not provide the Division authority to dismiss a request for medical fee dispute resolution upon finding that the disputed health care treatment is not related to the compensable injury or finding that there is no compensable workers' compensation claim. The Division agrees that fee dispute resolution would not be appropriate when service has been found not to be related to a compensable injury. However, the Division has amended §133.307(e)(3)(J) to clarify that a dismissal may occur if "the Division determines that good cause exists to dismiss the request; including a party's failure to comply with the provisions of this section," but, the Division disagrees that the rule does not provide authority to dismiss because "good cause" could address these situations. If issues of medical necessity or compensability have already been raised and conclusively adjudicated, no medical necessity exists, or, the service is not related to a compensable claim, then good cause would exist to dismiss the request for fee dispute resolution.

In regard to proposed §133.307(f)(2)(A), a commenter expressed concern that a party may not be able to meet the time frames proposed in the subparagraph when a medical review decision has been decided prior to the effective date of these adopted sections. The Division agrees that questions might exist in regard to the time frame for a party to file a request for an appeal to a Division contested case hearing when a medical dispute decision was issued between September 1, 2007, and the effective date of the rule, and that this concern is applicable to appeals to Division contested case hearings under both §133.307(f)(2)(A) and §133.308(t)(1)(B)(i). In response to the comment, the Division has adopted §133.307(f)(2)(A) with a minor change indicating that a written request for a contested case hearing must be filed "no later than the later of the 20th day after the effective date of this section or the 20th day after the date on which the decision is received by the appealing party," and the Division has adopted §133.308(t)(1)(B)(i) with a minor change indicating that a written request for a contested case hearing must be filed "no later than the later of the 20th day after the effective date of this section or 20 days after the date the IRO decision is sent to the appealing party."

A commenter recommended grammatical revisions to proposed §133.307(f)(2)(C). The Division agreed that the suggested edits provided clarity and revised §133.307(f)(2)(C) to state "Prior to a Division contested case hearing, either party may request a correction of a clerical error in a decision" and that "A request for a correction of a clerical error does not alter the deadlines for appeal."

In regard to §133.307(f)(2)(D) and §133.308(t)(1)(B)(v) (both provisions relating to the admission of evidence and witness testimony in Division contested case hearings), several commenters expressed concern that limiting admissible evidence to information presented during the MDR or IRO process goes against public policy in that it prevents parties from presenting complete claims and defenses. The commenters also indicated a concern that due process issues may arise if parties have insufficient time to investigate and respond to allegations which arise during a supplemental evidence exchange. The Division agrees that in order to eliminate due process challenges to the Division hearing process, the proposed sections should be revised and the first sentence of §133.307(f)(2)(D) and the entirety of §133.308(t)(1)(B)(v) as proposed were removed. In addition, limitations on documentary evidence admissible at a contested case hearing or limitations on witnesses who had not been disclosed during the MDR or IRO processes were not included in the adopted sections. As a result of not adopting proposed §133.308(t)(1)(B)(v), proposed §133.308(t)(1)(B)(vi) and (vii) have been renumbered in the adopted text as §133.308(t)(1)(B)(v) and (vi).

A commenter suggested that an IRO should be required to appear and testify at an appeal of the IRO's decision at no cost to the parties. In response, the Division explains that pursuant to Insurance Code §4202.009 "Information that reveals the identity of a physician or other individual health care provider who makes a review determination for an independent review organization is confidential." To further clarify this in the rule text, the provision "The IRO is not required to participate in the SOAH hearing or any appeal" has been incorporated into and adopted in §133.308(t)(1)(A).

Several commenters made various suggestions regarding the language in §133.308(d). One commenter asked that the subsection be revised to provide additional clarification to parties. Two commenters suggested changing the word "all" to "the," because it is not necessary that a reviewer have the qualifications to provide all the care that might be required by an injury, only the qualifications related to the specific service being reviewed. Two commenters suggested adding the sentence, "Nothing in

this subsection shall be construed to limit the clear statutory obligation to continually provide care that is necessary to cure or relieve the condition," to the end of the subsection, as a reference back to the governing statues which could help to eliminate potential disagreements related to the interpretation of the phrase "material recovery from or lasting improvement," and would better ensure that an injured worker receives necessary care by having an appropriate initial review rather. Additionally, one commenter requested that the medical specialty of spinal surgery be expressly addressed in subsection (d), and another commenter requested that the medical specialty of orthopedic surgery be expressly addressed in subsection (d). The Division does not believe these specialties need to be addressed because no distinction is made regarding them in HB 2004. However, the Legislature did make distinctions regarding dentistry and the practice of chiropractic in HB 2004 and the Division does believe it is appropriate to address these fields of practice in subsection (d). In response to these comments, the Division has revised the language that was proposed in §133.308(d), and adopted the following text: "Professional specialty requirements. Notwithstanding Insurance Code Chapter 4202, an IRO doctor, other than a dentist or a chiropractor, performing a review under this section shall be a doctor who would typically manage the medical or dental condition, procedure, or treatment under consideration for review, and who is qualified by education, training and experience to provide the health care reasonably required by the nature of the injury to treat the condition until further material recovery from or lasting improvement to the injury can no longer reasonably be anticipated. A dentist meeting the requirements of subsection (c) of this section may perform a review of a dental service under this section, and a chiropractor meeting the requirements of subsection (c) of this section may perform a review of a chiropractic service under this section. Nothing in this subsection can be construed to limit an injured employee's ability to receive health care in accordance with the Labor Code and Division rules or to limit a review of health care to only health care provided or requested prior to the date of maximum medical improvement."

In regard to §133.308(g)(1)(A) and (B), a commenter cited use of the word "providers" in each subparagraph and asked that the words "health care" be placed in front of the word "providers" each time it is used. However, rather than inserting the words "health care" in front of each use of the word "providers," the Division has instead modified §133.308(g)(1)(A) to say "health care providers (providers)." This change clarifies that the word "providers" is used in the section as a shortened form of "health care providers," and it is thus unnecessary to insert the words "health care" in the other places in the section where the word "providers" is used.

In regard to proposed §133.308(i), some commenters requested that the proposed language requiring a carrier to notify the Department of a request for an independent review on the day the request is received be modified to allow the carrier more time to notify the Department of the request. The commenters expressed concern that the proposed provisions would not allow sufficient time for the carrier to notify the Department. In response to these comments, the Division adopts language in §133.308(i) which requires a carrier to notify the Department of a request for an independent review "within one working day from the date" the request is received by the carrier or its URA.

In regard to proposed §133.308(l)(2) and (l)(3), a commenter said that due to the economics of the situation, parties often use clerical staff to determine what to submit to an IRO for use in an IRO review, and that a balancing act must be conducted, because IROs would prefer to just get documents that are relevant to the dispute, and not a mountain of records of which have nothing to do with the dispute. The commenter said that parties often send what they think is necessary, only to later learn that they may have needed to send more documentation. In response to the comment, the Division modified the language of §133.308(l)(2) and (3) to provide parties and their clerical staff additional guidance in determining what should be submitted to an IRO. As adopted, §133.308(l)(2) clarifies that the IRO should be provided "all medical records of the employee in the possession of the carrier or the URA that are relevant to the review, including any medical records used by the carrier or the URA in making the determinations to be reviewed by the IRO," and as adopted §133.308(l)(3) says "that the IRO should be provided "all documents, guidelines, policies, protocols and criteria used by the carrier or the URA in making the decision."

In regard to proposed §133.308(t), some commenters voiced concerns regarding the weight given to an IRO decision by the proposed subsection. The commenters suggested that an IRO decision should not carry presumptive weight. In response to the comments, the Division notes that the purpose of the proposed provision was to address a party's burden in regard to appealing an IRO decision, and the Division makes a text change to clarify this intent. The proposed version of §133.308(t) contained the sentence: "In a Contested Case Hearing (CCH), the decision issued by an IRO carries presumptive weight that may only be overcome by a preponderance of evidence-based medical evidence to the contrary." In the adopted text, this sentence has been changed to say: "In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence."

In regard to proposed §133.308(t)(1)(B)(ii), a commenter asked that the word "deliver" be changed to "send." The Division agrees to make this change, and the adopted version of §133.308(t)(1)(B)(ii) contains the word "send."

Amended §133.305(a) adds definitions for "requestor" and "respondent." Additional amendments renumber the paragraphs in the subsection accordingly. Additionally, an amendment to subsection (a)(6) expands the definition of "non-network health care" as used in Texas Administrative Code, Title 28, Subchapter D to include health care delivered pursuant to Labor Code §413.011(d-1) and §413.0115. This amendment clarifies that health care provided through a voluntary or informal network is non-network health care.

New §133.307(a)(1) specifies that the section is applicable to a request for medical fee dispute resolution for non-network or certain out-of-network health care not subject to a contract, that is remanded to the Division or filed on or after May 25, 2008. New subsection (a)(2) specifies that except as provided in paragraph (2) of the subsection, dispute resolution requests filed prior to May 25, 2008, shall be resolved in accordance with the statutes and rules in effect at the time the request was filed. New subsection (a)(2) specifies that subsection (f) of the section applies to a request for medical fee dispute resolution for non-network or certain authorized out-of-network health care not subject to a contract, that is pending for adjudication by the Division on September 1, 2007; remanded to the Division on or after September 1, 2007; or filed on or after September 1, 2007. New subsection (a)(3) says that in resolving non-network disputes regarding the amount of payment due for health care determined to be medically necessary and appropriate for treatment of a compensable

injury, the role of the Division of Workers' Compensation (Division) is to adjudicate the payment, given the relevant statutory provisions and Division rules.

Amendments to §133.307(c)(2)(A) and (B) and to §133.307(d)(2)(A) and (3)(A) clarify that medical bills and explanation of benefits must be in a paper format rather than the format used for electronic submission of these documents. Amended §133.307(c)(3)(C) clarifies that documentation of employment payment may include provider billing statements or like documents in addition to copies of receipts.

Amended §133.307(d) adds language to specify that the response to a request for MDR must be submitted to the Division and to the requestor.

Amendments to §133.307(d)(2)(A)(i) and (ii) specify that the carrier's response to a request for MDR shall also include all initial and reconsideration EOBs in a paper explanation of benefits format and a copy of all medical bills in a paper billing format using an appropriate DWC approved paper billing format.

The amendment to §133.307(d)(3)(A) clarifies that any documentation, including medical bills, shall be in a paper billing format using an appropriate DWC approved billing format.

Amendments to subsection §133.307(e)(1) specify that when additional information is requested by the Division, the party providing the additional information must also send a copy of the information to all other parties at the time it is submitted to the Division.

Amended §133.307(e)(3)(J) adds that the Division may determine that good cause exists to dismiss a request for a parties' failure to comply with the provisions of that section.

New §133.307(f) introduces another level of administrative hearings into the MDR process that allow a hearing either before SOAH or through the Division's contested case hearing process. Language changes are adopted to reflect the new appeal process, to update statutory citations, and to be consistent with language in §133.308.

Under new §133.307(f)(1), parties to fee disputes in which the amount of reimbursement sought by the requestor in its request is greater than $2,000 may request a hearing before SOAH. New §133.307(f)(1)(A) says that to request a contested case hearing before SOAH, a party shall file a written request for a SOAH hearing with the Division's Chief Clerk of Proceedings in accordance with 28 TAC §148.3. New §133.307(f)(1)(B) requires the party seeking review of the MDR decision to deliver a copy of its written request for a hearing to all other parties involved in the dispute at the same time the request for hearing is filed with the Division.

Under new §133.307(f)(2), parties to fee disputes in which the amount of reimbursement sought by the requestor in its request is less than or equal to $2,000 may appeal the MDR decision by requesting a contested case hearing held by the Division. New §133.307(f)(2)(A) says that to request a Division contested case hearing, a written request for a Division contested case hearing must be filed with the Division's Chief Clerk no later than the later of the 20th day after the effective date of this section or the 20th day after the date on which the decision is received by the appealing party; that the request must be filed in compliance with Division rules; and that the party appealing the decision shall deliver a copy of its written request for a hearing to all other parties involved in the dispute at the same time the request for a hearing is filed with the Division. New §133.307(f)(2)(B) notes that requests that are timely submitted to a Division location other than the Division's Chief Clerk, such as a local field office of the Division, will be considered timely filed and forwarded to the Chief Clerk for processing; however, this may result in a delay in the processing of the request; and that any decision that is not timely appealed becomes final. To avoid overlap with 28 TAC Chapter 148, the previous §133.307(h) has been moved to subsection §133.307(f)(2)(C) and is made applicable only to Division contested case hearings. New §133.307(f)(2)(C) changes the words "clerical correction" to "correction of a clerical" and the words "clerical correction" to "correction of a clerical error." New §133.307(f)(2)(D) says that at a Division contested case hearing under this paragraph, parties may not raise issues regarding liability, compensability, or medical necessity at a contested case hearing for a medical fee dispute. New §133.307(f)(2)(E) says that except as otherwise provided in the section, a Division contested case hearing shall be conducted in accordance with Chapters 140 and 142 of Title 28. Amendments to renumbered §133.307(f)(2)(F) reflect the new appeal process. Amendments to renumbered §133.307(f)(2)(G) clarify that the costs of preparing a certified record of hearing shall be the responsibility of the party seeking judicial review, and that upon request, the Division shall consider the financial ability of the party to pay the costs, or any other factor that is relevant to a just and reasonable assessment of costs.

New §133.308(a)(1) specifies that the section is applicable to independent review of network and non-network preauthorization, concurrent, or retrospective medical necessity disputes that are remanded to the Division or filed on or after May 25, 2008. Subsection (a)(1) further provides that except as provided in paragraph (2) of the subsection, dispute resolution requests filed prior to May 25, 2008, shall be resolved in accordance with the statutes and rules in effect at the time the request was filed.

New §133.308(a)(2) specifies that paragraph (1) of subsection (t) of the section applies to the independent review of network and non-network preauthorization, concurrent, or retrospective medical necessity disputes for a dispute resolution request that is pending for adjudication by the Division on September 1, 2007; remanded to the Division on or after September 1, 2007; or filed on or after September 1, 2007.

New §133.308(a)(3) says that when applicable, retrospective medical necessity disputes shall be governed by the provisions of Labor Code §413.031(n) and related rules.

New §133.308(a)(4) says all independent review organizations (IROs) performing reviews of health care under the Labor Code and Insurance Code, regardless of where the independent review activities are located, shall comply with this section. The Insurance Code, the Labor Code and related rules govern the independent review process.

An amendment to §133.308 creates a new subsection (c), which establishes that an IRO that uses doctors to perform reviews of health care services provided under §133.308 may only use doctors licensed to practice in Texas.

An amendment to §133.308 creates a new subsection (d), which specifies that an IRO doctor, other than a dentist or a chiropractor, performing a review under §133.308 shall be a doctor who would typically manage the medical or dental condition, procedure, or treatment under consideration for review, and who is qualified by education, training and experience to provide the health care reasonably required by the nature of the injury to treat the condition until further material recovery from or lasting

improvement to the injury can no longer reasonably be anticipated. A dentist meeting the requirements of subsection (c) of this section may perform a review of a dental service under this section, and a chiropractor meeting the requirements of subsection (c) of this section may perform a review of a chiropractic serviced under this section. Further, nothing in the subsection can be construed to limit an injured employee's ability to receive health care in accordance with the Labor Code and Division rules or to limit a review of health care to only health care provided or requested prior to the date of maximum medical improvement. Amendments renumber the sections which follow accordingly.

Amendments to renumbered §133.308(i) clarify that a requestor shall file a request for independent review with the insurance carrier that actually issued the adverse determination or the carrier's utilization review agent that actually issued the adverse determination no later than the 45th calendar day after receipt of the denial of reconsideration, and clarify that a carrier shall notify the Department of a request for independent review within one working day from the date the request is received by the carrier or its URA.

Amendments to §133.308 in renumbered subsections (k) and (p)(1)(F) remove references to Insurance Code Articles 21.58C and 21.58A, which have been recodified as TIC Chapters 4202 and 4201.

An amendment to renumbered §133.308(h)(2) corrects a punctuation error.

An amendment to renumbered §133.308(j)(2) changes the phrase "individual or entity requesting medical necessity dispute resolution" to "requestor," and an amendment to paragraph (5) in renumbered subsection (j) reflects the fact that subsection (g) is renumbered as subsection (i).

An amendment to renumbered §133.308(l)(2) and (3) adds that the documentation submitted by the carrier or carrier's URA shall include all medical records of the employee in the possession of the carrier or the URA that are relevant to the review, including any medical records used by the carrier or the URA in making the determinations to be reviewed by the IRO and all documents, guidelines, policies, protocols and criteria used by the carrier or the URA in making the decision.

In regard to non-network retrospective medical necessity dispute resolution when reimbursement was denied for health care paid by the employee, an amendment in renumbered §133.308(r) clarifies that IRO fees are to be remitted to the assigned IRO by the carrier. An amendment in renumbered subsection (r)(9) states that §133.308 shall not be deemed to require an employee to pay for any part of a review, and that if application of a provision of the section would require an employee to pay for part of the cost of a review, that the cost shall instead be paid by the carrier.

An amendment to renumbered §133.308(t) specifies that in a contested case hearing, the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence. Amendments to renumbered §133.308(t)(1)(A) and (B), introduce another level of administrative hearings into the MDR process that allow a hearing either before SOAH or through the Division's contested case hearing process.

Under the amendments, parties to retrospective medical necessity disputes in which the amount billed is greater than $3,000 may request a hearing before the SOAH by filing a written request for a SOAH hearing in accordance with 28 TAC §148.3 (relating to Requesting a Hearing); and parties to retrospective medical necessity disputes in which the amount billed is less than or equal to $3,000 dollars or who are appealing an IRO decision regarding determination of the concurrent or prospective medical necessity for a health service may appeal the IRO decision by requesting a Division contested case hearing.

Amended (t)(1)(A) specifies that a party to a retrospective medical necessity dispute in which the amount billed is greater than $3,000 may request a hearing before the State Office of Administrative Hearings (SOAH) by filing a written request for a SOAH hearing with the Division's Chief Clerk of Proceedings in accordance with §148.3 of this title (relating to Requesting a Hearing), the party appealing the IRO decision shall deliver a copy of its written request for a hearing to all other parties involved in the dispute, and the IRO is not required to participate in the SOAH hearing or any appeal.

Amended 133.308(t)(1)(B) specifies that a party to a retrospective medical necessity dispute in which the amount billed is less than or equal to $3,000 or an appeal of an IRO decision regarding determination of the concurrent or prospective medical necessity for a health care service may appeal the IRO decision by requesting a Division contested case hearing conducted by a hearing officer at the Division, and that a benefit review conference is not a prerequisite to a Division contested case hearing under the subparagraph. Amended subsection (t)(1)(B)(i) states that a party is required to file an appeal with the Division's Chief Clerk no later than the later of the 20th day after the effective date of this section or 20 days after the date the IRO decision is sent to the appealing party; the appeal must be filed in compliance with Division rules; and requests that are timely submitted to a Division location other than the Division's Chief Clerk, such as a local field office of the Division, will be considered timely filed and forwarded to the Chief Clerk for processing; however, this may result in a delay in the processing of the request.

Amended subsection (t)(1)(B)(ii) requires the appealing party to send a copy of its written request for a hearing to all other parties in the dispute, and says that the IRO is not required to participate in the Division contested case hearing or any appeal. Amended subsection (t)(1)(B)(iii) says that except as otherwise provided in the section, the hearing will be conducted in accordance with Chapter 140 and 142 of Title 28 of the Texas Administrative Code. Amended (t)(1)(B)(iv) provides that Prior to a Division contested case hearing, a party may submit a request for a letter of clarification by the IRO to the Division's Chief Clerk; that a copy of the request for a letter of clarification must be provided to all parties involved in the dispute at the time it is submitted to the Division but, the request may not ask the IRO to reconsider its decision or issue a new decision. Amended (t)(1)(B)(iv)(I) specifies that a party's request for a letter of clarification must be submitted to the Division no later than 10 days before the date set for hearing, and that the request must include a cover letter that contains the names of the parties and all identification numbers assigned to the hearing or the independent review by the Division, the Department, or the IRO. Amended (t)(1)(B)(iv)(II) specifies that the Department will forward a party's request for a letter of clarification by the IRO to the IRO that conducted the independent review. Amended (t)(1)(B)(iv)(III) specifies that the IRO shall send a response to the request for a letter of clarification to the Department and to all parties that received a copy of the IRO's decision within 5 days of receipt of the party's request for a letter of clarification, and that the IRO's response is limited to clarifying statements in its original decision; the IRO shall

not reconsider its decision and shall not issue a new decision in response to a request for a letter of clarification. Amended (t)(1)(B)(iv)(IV) specifies that a request for a letter of clarification does not alter the deadlines for appeal. Amended subsection (t)(1)(B)(v) specifies that a party to a medical necessity dispute who has exhausted all administrative remedies may seek judicial review of the Division's decision and judicial review shall be conducted in the manner provided for judicial review of contested cases under Chapter 2001, Subchapter G Government Code. Amended subsection (t)(1)(B)(v) further provides that a decision becomes final and appealable when issued by a Division hearing officer; if a party to a medical necessity dispute files a petition for judicial review of the Division's decision, the party shall, at the time the petition is filed with the district court, send a copy of the petition for judicial review to the Division's Chief Clerk; and, the Division and the Department are not considered to be parties to the medical necessity dispute pursuant to Labor Code §413.031(k-2) and §413.0311(e).

Amended subsection (t)(1)(B)(vi) provides that upon receipt of a court petition seeking judicial review of a contested case hearing, the Division shall prepare and submit to the District Court a certified record of the contested case hearing. Amended subsection (t)(1)(B)(vi)(I)(-a-) - (-e-) lists what must be included in the notice to the Division concerning an appeal for judicial review. Amended subsection (t)(1)(B)(vi)(II)(-a-) - (-f-) lists what is included in a certified record. Amended subsection (t)(1)(B)(vi)(III) provides that the Division shall assess the party seeking judicial review the expense incurred by the Division in preparing and copying the record, including transcription costs, in accordance with the Government, §2001.177; and that upon request, the Division shall consider the financial ability of the party to pay the costs, or any other factor that is relevant to a just and reasonable assessment of costs.

Amended §133.308(u) states that a written appeal for non-network spinal surgery must be filed no later than 20 days after the date the IRO decision is sent to the appealing party, and that the appeal must be filed in compliance with Division rules.

Amended §133.308(v) changes the words "health care provider" to "requestor."

GENERAL

Comment: In regard to the proposed sections, a commenter asks "What about pharmaceutical coverage, co-pay, tier ranking, and medical necessity disputes?"

Agency Response: The Department clarifies that the proposed sections address dispute resolution for fee and medical necessity disputes arising in relation to workers' compensation benefits. Patient copayments are not permitted under Texas workers' compensation law, so the proposed sections do not contemplate or address copayments. Additionally, the proposed sections do not address tier ranking.

Comment: A commenter asks whether the proposed sections are only related to workers' compensation.

Agency Response: The Division clarifies that the proposed sections only relate to workers' compensation. Specifically, the proposal is related to resolution of fee disputes arising under Title 5 of the Labor Code (the Workers' Compensation Act); and the proposal is related to resolution of medical necessity disputes arising under both the Workers' Compensation Act and Insurance Code Chapter 1305 (the Workers' Compensation Healthcare Network Act).

Comment: A commenter suggests that designated doctors should be allowed to charge a "no show" fee for missed appointments because there is approximately a 50% no-show rate. The commenter says that a doctor must still perform functions when there is a missed appointment, but is not compensated - and loses money. The commenter notes that attorneys can charge for missed appointments and urges the Division to address the disparity by bringing back the missed appointment fee that doctors could previously charge.

Agency Response: The Division clarifies that the proposed sections concern dispute resolution of fee and medical necessity disputes and not the amendment of fee guidelines. The Division notes that the amendment of fee guidelines were addressed in the rule proposal for §§134.1, 134.2, 134.203, and 134. 204, published in the *Texas Register* on October 5, 2007, (32 TexReg 6966). The public comment period for that proposal lasted from October 5 through November 5, 2007, and the Division received and responded to a similar formal comment.

Comment: A commenter thanks the Division for the opportunity to comment on the proposed rules. The commenter expresses belief that the proposed rules follow the enacted legislation, but suggests concern that parties will not be permitted to develop a full evidentiary record at the contested case hearing. The commenter asserts that this is necessary for due process rights in contested case hearings. The commenter further asserts that a full evidentiary record is necessary to ensure that decisions are fair, just and reasonable. The commenter also expresses concern about the possibility of health care providers "unbundling" services in an attempt to obtain an Division CCH rather than a SOAH hearing. The commenter recommends requiring parties to bring all related disputes in one claim between a health care provider and an employee or carrier.

Agency Response: The Division agrees to not adopt proposed §133.307(f)(2)(B) and §133.308(t)(1)(B)(v), which relate to the admission of evidence. The subparagraphs in §133.307(f)(2) and the clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

The Division declines to make a change regarding "bundling" of claims. The Legislate could have chosen to require a party to bring all disputes that may be related to a claim at one time, but it did not choose to do so. The Division believes that to create such a requirement by rule would impose burdens and delays not intended by the Legislature, because a party would have to wait before it could request dispute resolution, and might miss the required deadlines for earlier disputes. Additionally, a requirement that all related disputes be brought at one time might create a conflict with the dispute sequence requirements of §133.305(b), which requires that disputes regarding compensability, extent of injury, liability, or medical necessity be resolved prior to the submission of medical fee disputes.

Comment: A commenter says that the Division contested case hearing/SOAH appeal sections of proposed §133.307 and §133.308 address only traditional medical fee and IRO disputes and fail to address appeal of carrier refund disputes, even though 28 TAC §133.260 specifically makes refund disputes subject to 28 TAC §§133.305, 133.307, and 133.308. Specifically, the commenter notes that §133.305(a)(4)(C) defines a medical fee dispute as including "a provider dispute regarding the results of a Division or carrier audit or review which requires the provider to refund an amount for health care services previously paid by the carrier," and says that these involve carrier refund requests arising under Labor Code §408.0271 and 28 TAC §133.260.

The commenter suggests that HB 724 requires all carrier refund disputes to be appealed to SOAH pursuant to Labor Code §413.031 because Labor Code §413.0311 is not applicable as it applies only to reviews under Labor Code §413.031(b) - (i) which do not involve carrier refund disputes. As further support for this statement, the carrier notes that carrier refund request disputes do not involve reimbursements sought by a requestor, but that Labor Code §413.0311 is only applicable to a medical fee dispute "in which the amount of reimbursement sought by the requestor in its request for medical dispute resolution does not exceed $2,000." The commenter recommends that the adopted rules specifically address appeals of carrier refund disputes, and that all such disputes be referred to SOAH.

Agency Response: The Division disagrees with the comment, and declines to make a change because no change is necessary. Under Labor Code §408.0271, a health care provider is required to refund a payment for a service found by the carrier to be inappropriate and failure to reimburse a payment constitutes an administrative violation. Since the health care provider is required to refund the payment pursuant to Labor Code §408.0271, it is the health care provider that would file a request for dispute resolution because the provider would seek reimbursement for the services provided in the amount that had been refunded. The provider's request should be filed pursuant to the processes set out in §133.307 and §133.307. Since the provider would be a requestor seeking reimbursement and the dispute would be the amount of payment due for services, Labor Code §413.031 would be applicable - and Labor Code §410.0311 would be applicable if the amount of reimbursement sought by the provider in its request for medical dispute resolution does not exceed $2,000.

Comment: A commenter expresses concern regarding disparities in the system and the qualifications for doctors.

Agency Response: In preparing these rules, the Division has attempted to balance the rights and obligations of all parties in a way that satisfies the requirements of the Labor Code and best ensures a fair opportunity for medical dispute resolution, and the Division has attempted to address the professional certification qualifications of IRO review doctors in a way that is consistent with the Labor Code.

Comment: A commenter discusses injured worker pay and temporary income benefits. The commenter notes that an insurance company pays based on income before taxes and payroll deductions. The commenter submits that temporary income benefits should be calculated based on the cash to the injured worker not on the payment prior to insurance taxes and payroll. As an example, the commenter says that if an injured worker is to receive $576 as temporary income benefits, then the injured worker should receive no less cash than would occur if the injured worker accepts light duty because an injured worker is very financially stressed.

Agency Response: The Division clarifies that provisions concerning temporary income benefits are beyond the scope of this rule.

Comment: A commenter notes that while it is not in this rule, the commenter would like to address changing of treating doctors. The commenter suggests that an injured employee should get a "mulligan" concerning treating doctors, and should be able to change treating physicians with no questions asked, no forms, and no denial by the insurance company, at any time with in the first 60 days.

Agency Response: The Division appreciates the comment; however, the subject of changing treating doctors is beyond the scope of this rule.

Comment: A commenter says that it has experienced problems regarding past medical records and their impact on treatment decisions for current workers' compensation claims. The commenter says that it is difficult to get older medical records without a special subpoena, and that with some claims it is not possible to make all the records available to an IRO within the time limits.

The commenter says that there is a need to balance efficiency with quality, and that the solution rests with the contested case hearing process; the majority of fee and medical necessity disputes are small, but the important ones end up in contested case hearings. The commenter says that the system only works at the contested case hearing level, where, if something should not be performed, the best incentive to not have it performed is for the doctor to not be paid for it.

The commenter says that complex coding issues are difficult, and that it is not cost effective to develop a case for Medical Fee Dispute Resolution, so parties wait until an appeal to develop their case. The commenter says that allowing a hearing officer to determine good cause for the admission of evidence may sound reasonable, but would be arbitrary and invite additional litigation. The commenter says that allowing a hearing officer to determine good cause for the admission of evidence would conflict with the hearing officer's duty to fully develop the record under 28 TAC Chapter 142. The commenter says that it would give a hearing officer too much discretion. The commenter says that it would like to avoid bad decisions, because with good decisions there is no wiggle room, and the number of disputes will go down.

The commenter says that the number of disputes began to drop when the Medical Fee Guideline was linked to Medicare payment policies and when the Division began policing doctors and removing them from the ADL. The commenter says that this shows it is more sensible to address the root problem, rather than sacrificing quality for efficiency or an expedited process.

Agency Response: Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D) and §133.308(t)(1)(B)(v). The subparagraphs in §133.307(f)(2) and the clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

Comment: A commenter says that it is important to note that most, if not all stakeholders object to the provisions in §133.307(f)(1)(D) and §133.308(t)(1)(B)(v), and that this shows they do not believe the rule provisions to be appropriate.

The commenter notes says that stakeholders hoped the rule would allow addition evidence to be introduced, rather than create limitations based on what was submitted during the medical dispute process.

The commenter surmises that the Division could have concerns that parties would hide behind the law and ambush one another at hearing. In response to such concerns, the commenter suggests requiring an exchange of evidence and witness lists a set number of days prior to a hearing.

The commenter also expresses certainty that the Division is concerned about hearing officers making what would be tantamount to a medical decision. To address this, the commenter recommends adding a provision that would require a hearing officer to forward new documentation to an IRO and have the IRO doctor prepare an indemnity report and send it back to the parties for

further proceedings. The commenter would recommend that an additional fee be included in the provision, to reimburse IROs for their costs associated with the indemnity report.

Agency Response: Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D) and §133.308(t)(1)(B)(v). The subparagraphs in §133.307(f)(2) and the clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

The Division declines to insert a rule outlining a time frame for exchange of evidence and witness lists in this section. That would, more appropriately, belong in 28 TAC Chapter 142 relating to (Dispute Resolution--Benefit Contested Case Hearing).

The Division declines to require the hearing officer to forward new documentation to the IRO for the purpose of preparing an indemnity report. The Division also declines to charge additional fees to reimburse IROs for their costs associated with the indemnity report. The hearing officer currently has the option to entertain requests from the parties for a letter of clarification from the IRO. Labor Code §413.031 and §413.0311 do not provide for a second review by an IRO. Additionally, to require the hearing officer to forward documents to the IRO would be to usurp the authority of the hearing officer as outlined in 28 TAC Chapter 142 (relating to Dispute Resolution--Benefit Contested Case Hearing).

§133.305:

Comment: Two commenters say that the treatment guidelines and Medicare payment policies are key factors that provide for the control of medical costs in the Texas workers' compensation system and insure that only high quality, medically necessary health care treatment and services are provided to injured employees.

The commenters express belief that it is critical for Division hearing officers, independent review doctors, and Division medical fee dispute resolution staff to acknowledge and apply applicable provisions of the treatment guidelines and Medical payment policies during the course of the medical dispute resolution and associated contested case hearing processes. To this end, the commenters recommend adding a new subsection to §133.305(f) that says: "Applicability of Treatment Guidelines Adopted by the Commissioner of Workers' Compensation and Medicare Payment Policies. (1) The treatment guidelines adopted by the Commissioner of Workers' Compensation and Medicare payment policies are applicable to all medical disputes that arise in the Texas workers' compensation system. (2) The treatment guidelines and Medicare payment policies shall be considered during the medical fee payment dispute resolution review process. Applicable provisions of the guidelines and payment policies shall be referenced in all decisions issued at the conclusion of the medical fee payment dispute resolution review process. (3) The treatment guidelines and Medicare payment policies shall be considered during the medical dispute resolution by independent review organization process. Applicable provisions of the guidelines and payment policies shall be referenced in the independent review report issued at the conclusion of the medical dispute resolution by informal review organization process. (4) The treatment guidelines and Medicare payment policies shall be considered by a Division hearing officer during the course of a contested case hearing. Applicable provisions of the guidelines and payment policies shall be referenced in the contested case hearing decision issued at the conclusion of a medical dispute contested case process. (5) The decision of the Division or independent review report shall include an explanation and justification for any deviation from the applicable treatment guidelines and Medicare payment policies."

Agency Response: The Division agrees in part and disagrees in part with the commenters and declines to make a change because no change is necessary.

The Division agrees that use of treatment guidelines is important; however, §133.308 already requires an IRO reviewer to consider the Division's treatment guidelines and to explain any divergences from the treatment guidelines in a decision. IROs do not make fee determinations, so, it is unnecessary to require IRO reviewers to consider Medicare payment policies in determining medical necessity. Additionally, the purpose of these sections is not to direct the Division to act in a specific way, so, it is unnecessary for the rules to mandate that the Division or the Division staff apply Medicare payment policies or Division treatment guidelines in a particular way.

Comment: A commenter says that it is not clear whether a subclaimant has a remedy under fee or medical necessity disputes.

Agency Response: The Division clarifies that the proposed rule did not address subclaims. The Division notes that an early, informal draft of this rule did contain provisions specific to subclaimants. However, the overwhelming number of comments received in response to the informal draft indicated that subclaims should be addressed on their own, rather than as a part of this rule, so that the Division can thoroughly and effectively address all the issues associated with subclaims.

Rules developed by the subclaim rule team will determine the remedies that are available for subclaimants.

§§133.305(a) and (c); 133.307(a) - (c), (c)(1), (d), and (f); and 133.308(a), (e), (g), (i), (j), (m) - (p), (r)(2), (r)(2)(B), (s), and (t):

Comment: A commenter notes that informal rules are being considered by the Division to address subclaimant reimbursement and dispute resolution issues and expresses belief that the best course of action would be to create within the new subclaimant rules being considered a separate dispute resolution rule applicable only to subclaimants and workers' compensation insurance carriers. However, the commenter notes a compulsion to submit comments addressing the role of subclaimants in these proposed rules regarding the dispute process.

The commenter suggests the following specific changes to rule text:

-- In §133.305(a), the addition of the definition "medical benefit dispute--A dispute that involves an insurance carrier denying reimbursement to a subclaimant for a health care service paid in behalf of the injured employee where there is no dispute as to the compensability of the injury or illness. The insurance carrier denies the paid health care services as medical benefits under the Act. The dispute is reviewed by an independent review organization (IRO) pursuant to the Insurance Code, the Labor Code and related rules, including §133.308 of this subchapter (relating to MDR by Independent Review Organizations)" and "subclaim--A claim for reimbursement pursuant to Labor Code §409.009 or §409.0091 where the subclaimant has made benefit payments in behalf of the injured employee and been denied reimbursement by the carrier or employer" and adding a subparagraph to the definition for "medical dispute resolution" that says it includes "a medical benefit dispute resulting from a request for reimbursement under Labor Code §409.009 and §409.0091."

-- In §133.305(c), the addition of "(other than subclaims)" after the words "when resolving disputes."

-- In §133.307(a), the addition of a paragraph (2) to the applicability subsection which says, "This section applies to a request for medical fee dispute resolution that arises pursuant to a subclaim brought by a health care insurer under §409.009 and §409.0091."

-- In §133.307(b), the addition of a paragraph (5) that says, "a health care insurer that qualifies as a subclaimant as provided by Labor Code §§409.009 or 409.0091 and has a dispute over the amount of reimbursement due in its subclaim."

-- In §133.307(c), the addition of a new paragraph (4) that says, "Health Care Insurer Request. The health care insurer shall complete the required section of the request in the form and manner prescribed by the Division. The health care insurer shall file the request with the MDR section by any mail service or personal delivery. The request shall include: (A) the form DWC-60 table listing the specific disputed health care services, and the information required by §409.00911(f) relating to its subclaim; (B) a copy of any insurance carrier explanation of benefits statement (EOB) received by the subclaimant and relevant to the dispute; (C) if no EOB was received, documentation of the health care insurer's submission of the original request for reimbursement, including date of submission; (D) a statement of the subclaim, that shall include: (i) a description of the health care services under dispute; (ii) the subclaimant's reasoning for why the disputed fees should be reimbursed; (iii) how the Labor Code, Division rules, and fee guidelines impact the disputed fee issues including, if necessary, a discussion of fair and reasonable reimbursement if the dispute involves health care for which the Division has not established a maximum allowable reimbursement; (E) if the requestor is an authorized representative of the health care insurer, an affidavit certifying that the requestor is the authorized representative of the health care insurer."

-- In §133.307(c)(1), the addition of a subparagraph (C) that says, "A health care insurer subclaimant shall file a request for medical fee dispute resolution no later than the 120th calendar day after the workers' compensation carrier fails to respond to a request for reimbursement or after receipt of the workers' compensation insurance carrier's notice of denial or reduction of reimbursement."

-- In §133.307(d), the addition of the words "or the health care insurer's request for reimbursement" to subparagraph (C) following the words "the employee's reimbursement request."

-- In §133.307(f), that language be incorporated into the rule which sets venue for subclaimant Division contested case hearings and SOAH hearings in Austin.

-- In §133.308(a), addition of a new paragraph (2) that says, "This section applies to the independent review of medical benefit disputes that arise pursuant to a subclaim brought under Labor Code §409.009 or §409.0091."

-- In §133.308(e), addition of the words "a health care insurer subclaimant" following the words "any of the treating providers."

-- In §133.308(g), addition of a paragraph (3) that says, "In disputes arising as part of a subclaim, health care insurers pursuing a subclaim pursuant to Labor Code §409.009 or §409.0091."

-- In §133.308(i), breaking down of the subsection into paragraphs, and the insertion of a paragraph (2) that says, "A subclaimant requestor shall file a request for independent review with the carrier or the carrier's URA no later than the 120th calendar day after: (A) receipt of a denial of reimbursement based upon the health care service not being a valid medical benefit; or, (B) the failure of the insurance carrier to respond to a request for reimbursement."

-- In §133.308(j), breaking down of the subsection into paragraphs, and the insertion of a paragraph (2) that says, "The Department may dismiss a request for medical benefit dispute resolution if: (A) the requestor informs the Department, or the Department otherwise determines, that the dispute no longer exists; (B) the requestor is not a proper party to the dispute pursuant to subsection (g); (C) the request for dispute resolution is untimely pursuant to subsection (i) of this section; (D) the request for medical benefit dispute resolution was not submitted in compliance with the provisions of this subchapter; (E) the request for reimbursement was not submitted in compliance with §409.009 or §409.0091; or (F) the Department determines that good cause otherwise exists to dismiss the request."

-- In §133.308(m), the addition of a paragraph (4) that says, "Notwithstanding paragraph (1) of this subsection, in resolution of a subclaim, a subclaimant shall reimburse copy expenses for additional records requested by an IRO. Reimbursement shall be made pursuant to §134.120 of this title."

-- In §133.308(n), addition at the end of the subsection a sentence that says, "This subsection does not apply to medical benefit disputes."

-- In §133.308(o), addition of a paragraph (5) that says, "for subclaim medical benefit disputes, no later than the 30th day after the IRO receipt of the IRO fee."

-- In §133.308(p), insertion of a new paragraph (2) that says, "The IRO decision in a review of medical benefits under a health care insurer subclaim must include: (A) a list of all documents reviewed by the IRO, including the dates of those documents; (B) a statement that clearly determines for each disputed health care service whether that service is reimbursable as a medical benefit; (C) an analysis of, and explanation for each medical benefit determination; (D) a certification by the IRO that the reviewing provider has no known conflicts of interest pursuant to the Insurance Code Chapter 4201, Labor Code §413.032, and §12.203 of this title."

-- In §133.308(r)(2), addition of the words "and medical benefit" following the words "In non-network disputes."

-- In §133.308(r)(2)(B), addition of the words "or a medical benefit dispute arising from a subclaim" following the words "in a retrospective medical necessity dispute."

-- In §133.308(r)(2)(B)(ii), addition of the words "and any costs incurred under subsection (m)(4)" following the words "the IRO fee."

-- In §133.308(s), breaking down of the subsection into paragraphs, and the insertion of a paragraph (2) that says "Upon receipt of an IRO decision in a subclaim medical benefit dispute that determines the paid health care to constitute medical benefits, the carrier must process the reimbursement request, make payment (including fees and costs per subsection (r)), and issue a new explanation of benefits (EOB) to reflect the payment within 21 days."

-- In §133.308(t), that language be incorporated into the rule which sets venue for subclaimant Division contested case hearings in Austin.

Agency Response: The Division declines to make these change, because the rule proposal did not address subclaimants and it would constitute a substantive change if the adopted sections were to include provisions addressing subclaimants. The Division notes that an early, informal draft of this rule did contain provisions specific to subclaimants. However, the overwhelming number of comments received in response to the informal draft indicated that subclaims should be addressed on their own, rather than as a part of this rule, so that the Division can thoroughly and effectively address all the issues associated with subclaims. Rules developed by the subclaim rule team will determine the remedies that are available for subclaimants.

§133.305(a):

Comment: In order to provide consistency, clarity and due process in the medical dispute resolution process, a commenter recommends addition of a new definition to §133.305 which says, "Amount in dispute - the amount in dispute is determined either by the nature of the service or the amount of the service disputed by the insurance carrier. For example, but not by way of limitation: (A) an inpatient admission service is the determined from the first day of admission to the hospital until the day of discharge from the hospital; or (B) a physical therapy service is the determined from the commencement of initial treatment or the proposed initial treatment to the conclusion of the treatment or proposed treatment if less than six weeks of treatment or proposed treatment; or (C) the amount of the diagnostic study." Additionally, the commenter recommends addition of a new definition to §133.305 which says, "Dispute - a medical fee dispute and/or prospective medical dispute and/or retrospective medical dispute." The commenter explains that this definition should be applied in such a way that: 1) if the dispute concerns inpatient admission, then the amount in dispute includes the entire inpatient admission; 2) if the dispute concerns outpatient ambulatory service center treatment, then the amount in dispute is based on the procedures or services provided on that particular date of service; and 3) if the dispute concerns physical therapy, then the amount in dispute is based on what was requested - for instance, if it is six weeks (two visits each week), then the entire six weeks should be taken into consideration in determining the amount in dispute; or, the amount in dispute could be the entire amount that the carrier is billed.

Agency Response: The Division disagrees and declines to make a change because the proposed definitions are unnecessary and too narrow. The Division notes that the term "amount in dispute" is not used in the sections, so, it is not necessary to provide a definition for the term. The Division also notes that the rule already contains definitions for individual types of disputes, so, it is unnecessary to create a broad definition for the term "dispute." Additionally, the recommended definition for "dispute" would exclude disputes requiring concurrent IRO review as a type of dispute and is, thus, too narrow.

§133.305(a)(8):

Comment: In regard to §133.305(a)(8), a commenter suggests that the definition of "requestor" as any "party" is ambiguous and may lead to confusion. The commenter says that absent rare situations where an injured worker actually pays for medical services the only parties who should be able to request medical dispute resolution should be providers, employers, or carriers. The commenter suggests that the proposed section should specify that a claimant may not file for medical fee dispute resolution in a dispute between a provider and a carrier or employer.

The commenter also suggests that for consistency with proposed §133.307(b)(3) and (b)(4), the definition should clarify that a claimant may only file a request for medical dispute resolution when the claimant is in a dispute with a carrier for reimbursement of medical expenses paid by the claimant or the claimant is in a dispute with the medical provider because the claimant paid the provider in excess of the applicable fee guidelines.

Agency Response: The Division disagrees with the commenter's suggestion, and declines to make the recommended change because such a change would place unnecessary and improper limitations on an injured employee's ability to pursue medical dispute resolution. The Division notes that safeguards are already in place within §133.307 and §133.308 to specify who may request dispute resolution and limit the filing of inappropriate disputes. Section 133.307(b)(3) and (4) states which parties may be requestors in medical fee disputes and §133.308(g)(1) and (2) states which parties may be requestors in medical necessity disputes.

Comment: A commenter suggests that the definition for "requestor" in §133.305(a)(8) is too expansive. The commenter says that the definition, as proposed, could be read to include any injured employee submitting a request for dispute resolution even between medical providers and insurers. The commenter says that if this is permitted, it could shift the cost of the IRO fee in retrospective disputes from the provider to the insurer. The commenter says that an injured employee is not a proper participant in a dispute that arises between an insurer and a health care provider over reimbursement of medical bills and this provision could lead to an injured employee being held more responsible for the costs of treatment beyond what the insurer is willing to pay. The commenter says that its purpose is to leave the employee out of any responsibility for the cost of treatment completely and not have the injured employee drawn into a dispute indirectly.

Agency Response: The Division disagrees with the comment and declines to make a change because a change is unnecessary. The definition for "requestor" in §133.305 is intended to be general and is intended to include an injured employee because injured employees are allowed to pursue medical dispute resolution. However, it is unnecessary to address the possibility of injured employees becoming inappropriately involved in disputes in §133.305 because safeguards are in place in §133.307 and §133.308. Section 133.307(c)(3) addresses the situations in which an injured employee may request medical fee dispute resolution and §133.308(g)(1)(B) and §133.308(g)(2)(B) address the situations in which an injured employee may request medical necessity review.

Comment: A commenter addresses §133.305(a)(8). The commenter asserts that the definition is contradictory because the party seeking relief is not always the party who filed a request for medical dispute resolution. The commenter says that in later stages the definition does not make sense and that the definition has been interpreted to shift the burden of proof in later proceedings. The commenter recommends dropping the words "the party seeking relief in medical dispute resolution," and suggests changing the definition of "respondent" to reflect that the respondent is the person responding to a request for dispute resolution.

Agency Response: The Division disagrees and declines to make a change because no change is necessary. As noted in §133.305(a), the definitions in §133.305 apply when the terms are used in Subchapter D of 28 TAC Chapter 133 and a requestor is a party who has timely filed a request for medical dispute resolution pursuant to §133.307 or §133.308 because the party is seeking relief under that section.

Because the applicability of the definition is expressly limited to Subchapter D, the definition is not applicable in later stages of the dispute resolution process, unless the section controlling the later proceeding references §133.305 (such as with 28 TAC §148.3(c), which says that a petition must "be signed by a requestor or respondent as defined by §133.305").

The Division notes that 28 TAC Chapter 148, which is relevant to appeals that proceed to SOAH, establishes its own definitions for the parties involved in disputes under Chapter 148. Specifically, a "petitioner" is "the person who has filed a written request for a hearing in accordance with these procedures [the procedures in Chapter 148]," and "respondent" is "the person responding to the petitioner's request for a hearing."

Further, the Department notes that the burden of proof in a Division contested case hearing rests on the party that requests the contested case hearing.

Comment: In regard to §133.305(a)(8), a commenter suggests that the definition of "requestor" is overly broad and suggests revising the definition to say "Requestor--The party that files a request for medical dispute resolution with the Medical Fee Dispute Resolution Section of the Division of Workers' Compensation in a medical fee dispute or files a request for independent review with the insurance carrier; the party seeking relief in medical dispute resolution." The commenter also recommends adding two subparagraphs to the definition that say "(A) An injured employee may not file a request for medical dispute resolution in a medical fee payment dispute or retrospective medical necessity dispute that arises between a health care provider and carrier, and "(B) An injured employee may only file a request for medical dispute resolution in the manner provided for by §133.307(b)(3) and (b)(4) of this title (relating to MDR Fee Disputes) and §133.308(g)(1)(B) and (g)(2)(B)."

Agency Response: The Division agrees in part, and disagrees in part. The Division agrees to make the suggested change to the definition for "requestor." However, §133.308 already establishes limitations on when an injured employee can request an independent review and §133.307 already establishes limitations on when an injured employee can request fee dispute resolution, so, it is unnecessary to place such limitations in the definition for "requestor." For this reason, the Division disagrees with the suggestion to add new subparagraphs (A) and (B) to the definition and declines to make this recommended change.

§133.305(c):

Comment: A commenter notes that §133.305(c) allows the Division to assess fees against providers. The commenter says that the provision fails to recognize that good faith disagreements can occur. The commenter says that fees should not be assessed in the absence of bad faith and requests that the subsection either be deleted or modified to include a lack of good faith in the action of the carrier or provider as triggering the imposition of division administrative fees.

Agency Response: The Division disagrees with the comment and declines to make a change because no change is necessary. Assessment of an administrative fee is discretionary on the part of the Department and is based upon the specific facts of each medical dispute.

§133.307:

Comment: In regards to §133.307, a commenter suggests that if medical providers believe a Division contested case hearing would offer an advantage to them over a SOAH review, they might "unbundle" services to qualify for review through a Division contested case hearing. The commenter says that it is critical that the section contain a prohibition on medical providers or other requestors from unbundling services that are related to treatment involving the same injury.

The commenter also suggests that the proposed rule should contain an affirmative requirement that all services related to the same injury shall be consolidated in a single claim and that consolidated claims over the applicable maximum dollar amounts be transferred to SOAH.

Agency Response: The Division declines to make a change regarding "bundling" of claims. The Legislature could have chosen to require a party to bring all disputes that may be related to a claim at one time, but, it did not choose to do so. The Division believes that to create such a requirement by rule would impose burdens and delays not intended by the Legislature because a party would have to wait before it could request dispute resolution and might miss the required deadlines for earlier disputes. Additionally, a requirement that all related disputes be brought at one time could create a conflict with the dispute sequence requirements of §133.305(b), which requires that disputes regarding compensability, extent of injury, liability, or medical necessity be resolved prior to the submission of medical fee disputes.

The Division clarifies that nothing prevents a health care provider from combining medical bills for the same patient and the same claim (with multiple dates of service) into one medical fee dispute. If appealed, after a medical dispute decision is issued, such a dispute would be considered one medical fee dispute for proceedings in a contested case hearing.

§§133.307(a), 133.308(a); 133.307(f)(2)(D) and 133.308(B)(v):

Comment: Commenters cite the applicability provisions in §133.307(a) and §133.308(a). The commenters say that they disagree with the intent to apply all of §133.307 and §133.308 to medical fee disputes that have already been filed and in which documentary exchanges have already been made. One commenter states that although the Legislature made the statute providing the right to a hearing effective as stated there is no requirement that aspects of these proposed rules dealing with evidentiary issues at hearings must be effective on the listed dates. A commenter asserts that the proposed sections impermissibly apply evidentiary provisions retroactively. A second commenter says that the section cannot be made applicable retroactively to a time when another statutory provision existed. The commenter says that disputes filed prior to September 1, 2007 must be handled under the statute and rule in effect at the time the dispute was filed.

The first commenter recommends that the effective date of §133.307(f)(2)(D) and §133.308(B)(v) be the date the rules are adopted and that the provisions be applied to disputes filed after that date. The second commenter recommends that the proposed language making the section applicable to health care pending on September 1, 2007 be deleted.

Agency Response: The Division agrees in part and disagrees in part. A primary purpose of these rules is to implement HB 724, which provides a process for the appeal of administrative disputes arising under Labor Code §413.031. The Labor Code provision that had provided the process for appealing administrative decisions (Labor Code §413.031(k) as revised by HB 7, 79th Regular Legislative Session) was found to be unconstitutional, so prior to HB 724, there was no statutory provision in place to provide a process for appealing administrative decisions under Labor Code §413.031. To resolve the lack of statutory provisions, the enacting clause in Section 9 of HB 724 makes the bill applicable to "workers' compensation medical disputes described by Section 413.031, Labor Code, as amended by this Act and Section 413.0311, Labor Code, as added by this Act . . . that are pending for adjudication by the division of workers' compensation of the Texas Department of Insurance on or after the effective date of this Act [September 1, 2007] . . . ."

In regard to the appeal of a dispute described by Labor Code §413.031 or §413.0311, the Division disagrees that it is attempting to make these processes retroactive to a time when another statutory provision existed, because there was not a valid statutory provision in place prior to HB 724, only the unconstitutional statutory provision found in Labor Code §413.031(k) as it existed prior to HB 724. In regard to the appeal of a dispute described by Labor Code §413.031 or §413.0311, the Division is using the specific terms of applicability listed in Section 9 of HB 724.

However, not all the amendments in §133.307, and §133.308 are based on HB 724, so the effective dates in Section 9 of HB 724 would not be applicable to them.

For this reason, the Division agrees in part with the commenter and disagrees in part with the commenter. In response to the comment the Division has changed the applicability provisions in §133.307(a) and §133.308(a) to specify that §133.307 and §133.308 are applicable to disputes filed May 25, 2008; however, the Division has also adopted language §133.307(a) and §133.308(a) that keeps the proposed dates of applicability in regard to §133.307(f) and §133.308(t)(1), the subsection in §133.307 and the paragraph in §133.308(t) that implement HB 724. Because these provisions implement HB 724 in order to cover the statutory gap addressed by HB 724, these provisions adopt the specific terms of applicability listed in Section 9 of HB 724.

§133.307(b):

Comment: In regard to §133.307(b), a commenter asks why carriers and third party administrators have been removed from the list of parties that may request a fee dispute. The commenter says that not allowing carriers to file fee disputes necessitates the filing of a complaint when a party refuses to refund an overpayment following subsequent denial after reconsideration. The commenter says that it takes a significant period of time for TDI to investigate a complaint and take enforcement action. Further, it is confusing to providers that they must refund a disputed amount following denial of reconsideration and also a fee dispute if they disagree with the carrier's findings.

Agency Response: The Division clarifies that in proposed §133.307(b) it did not remove carriers or third party administrators from the list of parties that may request fee dispute resolution. No changes were proposed for §133.307(b), and parties who may request a fee dispute are the same under the proposal as under current rules.

The process for refund of a payment by a provider to a carrier is regulated by Labor Code §408.0271 (relating to Reimbursement by Health Care Provider) and 28 TAC §133.260 (relating to Refunds). Labor Code §408.0271 provides a refund process in which the carrier must notify a provider of its decision that the care that was reimbursed for has been found to be inappropriate and demand reimbursement from the provider. Under Labor Code §408.0271, a health care provider is required to refund a payment for a service found by the carrier to be inappropriate and failure to reimburse a payment constitutes and administrative violation. Additionally, under Labor Code §408.0271, it is the health care provider that has the option of filing an appeal based on a carrier demand for reimbursement.

Rule provisions that provide a refund process in conflict with the requirements of Labor Code §408.0271 would not be valid.

§133.307 (c)(1)(A); (c)(2)(A), (B) and (E); and (e)(3); and §133.308(j)(4):

Comment: A commenter states that if health care insurer subclaimants are to proceed to dispute resolution in the same manner as injured employees or health care providers, then the rule should be amended to provide exceptions when requirements for injured employees and/or health care providers would not be applicable to health insurer subclaimants.

Specifically, the commenter says that §133.307(c)(1)(A) requires that requests for medical fee dispute resolution be filed within one year after a date of service, but, many subclaims filed under Labor Code §409.009 relate to dates of service older than one year. The Commenter notes that health care insurer subclaimants may obtain data on claims going back to September 1, 2002, and HB 724 provides that a health care insurer must file a request for reimbursement with the workers' compensation insurance carrier not later than six months after the date on which the health care insurer received information under Labor Code 402.084(c-3) and not later than 18 months after the health care insurer paid for the health care service. The commenter also notes that HB 724 provides that for subclaims based on data matched prior to January 1, 2007, a subclaimant may file a subclaim or request for reimbursement by March 1, 2008. The commenter says that the Division could have made the time limits for providers and claimants applicable to subclaimants, but did not. The commenter recommends that subclaimants be made exempt from the one year filing requirement under §133.307(c)(1)(A) since it conflicts with specific statutory provisions relating to subclaimants.

Additionally, the commenter says that subclaimants filing medical fee disputes should be exempt from document submission requirements in §133.307(c)(2)(A), (B) and (E), because a health care insurer would not possess these documents. The commenter says that a subclaimant should only be required to provide documentation that forms the basis for a reimbursement request or medical records exchanged pursuant to Labor Code §409.0091 because a requirement for additional medical records would place the Division's fee dispute in the position of deciding issues that go beyond the request for reimbursement.

In addition, the commenter notes that §133.307(e)(3) provides reasons for dismissal of a medical fee dispute. The commenter says that subparagraphs (D) and (F) should not apply to subclaimants. The commenter notes that subparagraph (D) allows dismissal when the health care in question has previously been adjudicated by the Division and the commenter says that an exception is necessary to prevent the Division from dismissing a

medical fee dispute that did not involve the HCI subclaimant as a party. The commenter notes that subparagraph (F) allows dismissal of a request for dispute resolution if the Division determines that the medical fee dispute is for health care services "provided pursuant to a private contractual fee arrangement." The commenter says the clear intent of the provision is for it to be applicable when a contract exists between a workers' compensation carrier and a health care provider. The commenter says that a large number of subclaims will be based on health care services paid by a health care insurer under a contract with a health care provider and subclaimants should be exempt from the provision.

Additionally, the commenter notes that §133.308(j)(4) allows the Department to dismiss a request for independent review if the Department has previously resolved the dispute for the dates of health care in question. The commenter notes that while a request for IRO review may involve health care that has already been the subject of an IRO review, the parties to the dispute may not be the same if a subclaimant is involved. The commenter says that a subclaimant should not have a request dismissed based on an IRO review filed by another party.

Finally, the commenter notes that the DWC-60 form does not have a box for a HCI subclaimant to check as a requester or respondent.

Agency Response: The Division declines to make a change, because the rule proposal did not address subclaimants and it would constitute a substantive change if the adopted sections were to include provisions addressing subclaimants. The Division notes that an early, informal draft of this rule did contain provisions specific to subclaimants. However, the overwhelming number of comments received in response to the informal draft indicated that subclaims should be addressed on their own, rather than as a part of this rule, so that the Division can thoroughly and effectively address all the issues associated with subclaims. Rules developed by the subclaim rule team will determine the remedies that are available for subclaimants.

§133.307(c)(2):

Comment: Three commenters suggest adding an additional requirement to §133.307(c)(2) to require a requestor to identify all other fee disputes between requestor and carrier involving the same patient with the same date of injury and for which the requestor has or will seek additional reimbursement. One commenter says that such a requirement would assist in avoiding multiple contested case hearings between the parties. Another commenter says such a change would expedite the resolution of all issues involving that employee and save transactional costs for all.

Agency Response: The Division disagrees with the suggested language establishing a requirement for the requestor to identify other medical fee disputes for which it may seek additional reimbursement and declines to make a change. Not all medical fee disputes will be appealed to a contested case hearing, thus, identifying all other medical fee disputes whether closed or active would serve no purpose.

The Division does clarify that a requestor may combine medical bills for the same injured worker and date of injury, if, upon initial request, the dates of service are within one year or meet the exceptions as outlined in §133.307(c)(1)(B). Such a request, although consisting of several medical bills, would be considered one medical fee dispute. This dispute may be appealed to the next administrative level together as it related to the statutory language of §413.0111(a)(1) "a medical fee dispute."

§133.307(c)(2)(A):

Comment: A commenter expresses support for the provision in §133.307(c)(2)(A) that calls for a requestor to file a paper copy of disputed medical bills, but recommends that the requirement be for electronic billing data to be submitted in a format prescribed by the Division to avoid the data being filed using multiple formats. The commenter says that such a requirement would avoid confusion that could arise if the format for submitting a bill is not specified.

Agency Response: The Division agrees with the comment and has made the recommended change.

§133.307(c)(3):

Comment: A commenter suggests making changes to §133.307(c)(3) to require an injured employee to show verifiable or confirmable proof of payment for treatment received, such as copies of receipts, cancelled checks, or credit card receipts or payments, as part of the request for hearing. The commenter suggests that this requirement would prevent situations where "the doctor tells the employee, 'Look, I am not going to go ahead and bill you now. But in order for me to get paid, go ahead and submit this request and act like you have already been charged for this treatment.'"

Agency Response: The Division disagrees because the rule already places limitations on when an injured employee can request fee dispute resolution, thus, the recommended changes are unnecessary. Additionally, the recommended changes would create the requirement that an injured employee prove standing before the Division would consider the underlying issues of the dispute, this would place an unnecessarily burden on injured employees' access to the dispute resolution system. The Division notes that the hypothetical situation described by the commenter would constitute fraud and would be prohibited under the current rule.

§133.307(c)(3)(C):

Comment: Several commenters made suggestions in regard to the proposed text change in §133.307(c)(3)(C).

One commenter suggests adding the words "EOB statements" in front of the words "provider billing statements, and changing the word "like" to "similar."

Another commenter asserts that the proposed text would change a requirement for "proof" to be only "documentation" and that the proposed text says that provider billing statements are a type of evidence sufficient to demonstrate payment by an employee. The commenter says that the rule was sufficient and that no compelling reason exits to dilute the current requirement that proof of payment be filed by the employee. The commenter asserts that an employee should only be permitted to bring a dispute if he or she can offer proof of actual payment and an employee certainly cannot win the case without "proof" of payment. The commenter says that weakening the requirement to mere "documentation" is merely an invitation to commit fraud and the potential use of forged documents. The commenter also says that listing "provider billing statements or like documents" as sufficient evidence of payment of the bill by the employee is extremely problematic because receipt of a bill is not proof of payment of a bill. The commenter says that it would be fraudulent to offer

a bill into the record as proof of payment and that the proposed rule text would create unnecessary disputes and invite fraud.

Three other commenters also say that "provider billing statements or like documents" would not substantiate that an injured employee actually paid for medical care and ask that the text be amended to state that the injured employee must submit proof of actual payment. Two of the commenters specifically ask that the text be changed to say "proof of employee payment, such as receipts that document payment by the injured employee, and cancelled checks." One of the commenters asserts that a provider billing statement by itself does not adequately prove that an injured employee has made payment. Another commenter asserts that this recommended change would: "(1) ensure that the parties submit all relevant materials to the dispute; (2) deter fraud; (3) deter gamesmanship on the part of some injured workers' and some health care providers; and (4) comply with the Texas Constitution among other reasons."

Agency Response: The Division agrees in part and disagrees in part, and the Division agrees to make a revision to the rule text.

In regard to the first commenter, the Division agrees that a provider EOB statement might be a relevant piece of evidence in determining whether an injured employee had paid for medical services and what amount the injured employee has paid. However, the intent is not to provide an exhaustive list of potential evidence in §133.307(c)(3)(C). Instead, the items listed in the subparagraph are intended to be examples of what might be offered as evidence. Rather than adding to the list of possible evidence, the Division has added the word "including" in front of the words "copies of receipts" as an indication that the list is not exhaustive. The Division agrees to change the word "like" to "similar."

In regard to the commenters who express concern over the proposed change of the word "proof" to "documentation," the Division clarifies that §133.307(c)(3)(C) does not establish the burden of proof an injured employee must meet, but only lists the types of evidence an injured employee should provide to the Division in support of its claim. As such, changing the word "proof" to documentation" does not weaken an injured employee's burden. However, the Division agrees to change the word "documentation" back to "proof" in the adopted rule text.

The Division disagrees with the comment that suggests including provider billing statements as a type of evidence is an invitation to fraud. The Division notes that the section does not state that a provider billing statement "is sufficient evidence of payment of the bill by the employee." A billing statement, in and of itself, is not sufficient to prove that a party paid a bill. However, a billing statement could support such a finding if it is offered in conjunction with other evidence, such as a canceled check in the amount of the bill that is made out to the provider named on the billing statement. Additionally, the Division clarifies that the term "like documents" is not solely a reference to provider billing statements, but is a reference to all the types of documents listed in the subparagraph. Finally, the Division does not agree that the recommendation would ensure that parties submit all relevant materials to the dispute, deter fraud or gamesmanship, or is required by the Texas Constitution. For these reasons, the Division declines to delete the words "provider billing statements." As noted above, the Division has changed the words "like documents" to "similar documents."

§133.307(d)(1):

Comment: A commenter notes that §133.307(d)(1) says a response is deemed timely if received by the Division within 14 calendar days after the date the respondent received the requestor's dispute.

The commenter says that determining timelines based on when documents are received may become a disputed issue.

The commenter suggests changing all time frames to set a time frame that DWC can actually verify should a dispute over timeline arise, e.g., base the time frame on when documents are filed and not when received by the respondent.

Agency Response: The Division disagrees with the suggestion and declines to make a change, because no change is necessary. As outlined in §133.307(c)(4), the Division forwards the dispute request to the respondent, and the respondent is deemed to have received the request on the acknowledgement date as defined in 28 TAC §102.5 (relating to General Rules for Written Communications to and from the Commission). 28 TAC §102.5(d) states, "For purposes of determining the date of receipt for those written communications sent by the Commission which require the recipient to perform an action by a specific date after receipt, unless the great weight of evidence indicates otherwise, the Commission shall deem the received date to be the earliest of: five days after the date mailed via United States Postal Service regular mail; the first working day after the date the written communication was placed in a carrier's Austin representative box; or the date faxed or electronically transmitted." Given the provisions in §133.307(c)(4) and §102.5(d), it is possible to calculate the date of receipt, which means it is possible to calculate the date on which the response is due.

In addition, when the Division places documents in a carrier representative box, a "carrier sign sheet" requesting a signature acknowledging receipt of documents is attached. This document is maintained in the dispute file.

§133.307(d)(2)(A)(i) and (A)(ii):

Comment: In regard to §133.307(d)(2)(A)(i) and (A)(ii), a commenter requests clarification regarding the requirement for the carrier to provide "in a paper format."

The commenter expresses an assumption that the provision allows a carrier to submit e-billing and payment data in a paper format of its choice.

Agency Response: The Division clarifies that paper formats used should be in a Division approved billing format. To further clarify that paper formats used should be in a Division approved billing format, the Division has made a change to the proposed rule text that specifies this.

§133.307(d)(2)(B):

Comment: Two commenters address §133.307(d)(2)(B).

One commenter says that during the medical dispute resolution process the provider is allowed to present all reasons to support additional reimbursement and is not limited to only those reasons given to the carrier prior to filing the request for MDR.

The commenter says that a carrier should be allowed to present all reasons to support denial, and not be limited to the reasons presented to the provider prior to filing of the request for medical fee dispute resolution.

The commenter says that this denies the carrier of the right to a meaningful audit and helps promote billing fraud.

The commenter says that Labor Code §408.027 requires the carrier to pay or dispute a medical bill within 45 days of receipt of it, and that the statute allows the carrier to audit the bill and is required to complete the audit within 160 days of receipt of the bill. The commenter says that if the provider requests medical fee dispute resolution prior to completion of the audit, the carrier is deprived from using any new reasons for denial discovered during the audit.

A second commenter says that the provision is directed at carriers, and that it is a "one-way street." The commenter notes that parties are allowed to make amendments to their pleadings or arguments at virtually every level of a dispute process, but that this is the only dispute process that essentially establishes a statute of limitations that doesn't exist in the statute. Additionally, the commenter says that the point when new issues are cut off is established by the opposing party. The commenter says that this prevents a full airing of issues.

The commenter notes that it previously commented on this provision when the rule was last revised, and that the apparent response of the Division was to add subsection (e)(2) which allows the Division *sua sponte* to add its own issues. However, says the commenter, in its experience the Division does not use subsection (e)(2).

Agency Response: The Division disagrees with the comments, and declines to make a change.

The Division clarifies that pursuant to 28 TAC §133.230(a), an insurance carrier may perform an audit on a medical bill that has been submitted by a health care provider to the insurance carrier for reimbursement. However, the insurance carrier may not audit a medical bill upon which it has taken final action. In addition, §133.230 provides that if an insurance carrier decides to conduct an audit, the insurance carrier shall provide notice to the health care provider no later than the 45th day after the date the insurance carrier received the completed medical bill. This would mean that that no explanation of benefits with reasons for denial for final action would have been received at the point the insurance carrier notified the health care provider of the audit. Therefore, when the insurance carrier completes the audit, there will be no "new" reasons; there will be the "original" reasons for payment, reduction or denial on the first explanation of benefits for final action after the audit. The carrier has the opportunity to include all reasons for denial in the explanation of benefits sent after the audit.

The health care provider, if unsatisfied with the carrier's final action, may request reconsideration as a prerequisite to requesting medical dispute resolution. A carrier has two opportunities to bring up reasons for payment reduction or denial prior to medical dispute resolution.

The Division notes that carriers are not singled out, and that limitations do exist on the issues that a provider can raise in a medical fee dispute resolution proceeding. Specifically, pursuant to §133.307(e)(3)(G), the Division will dismiss a request for fee dispute resolution if it contains issues concerning unresolved adverse determinations of medical necessity. This provision is also related to subsection (e)(2), commented on by the second commenter. Under (e)(2), the Division may raise issues of medical necessity when it determines that they exist, but were not voiced in the request or response for medical fee dispute resolution. Once raised, this would result in a dismissal pursuant to §133.307(e)(3)(G).

Comment: A commenter expresses support for the concept of prohibiting new issues and defenses from being raised subsequent to a filing of a response to a dispute, and recommends the adoption of this paragraph without changes.

Agency Response: The Division appreciates the support, but clarifies that §133.307(d)(2)(b) says the response shall address only those denial reasons presented to the requestor prior to the date the request for medical dispute resolution was filed with the Division and the other party, not subsequent to filing a response. The limitation is based on the date the request for medical dispute resolution is filed.

§133.307(d)(3)(A):

Comment: A commenter notes that §133.307(d)(3)(A) requires a health care provider responding to a request for medical fee dispute resolution to include with its response copies of relevant medical bills in a paper billing format. The commenter suggests that the provision additionally specify that the paper billing format be a format prescribed by the Division, in order to avoid confusion that could arise if the format is not specified. The commenter suggests that the provision require the provider to submit its electronic billing data using the appropriate DWC approved billing form.

Agency Response: The Division agrees with the comment, and has changed the text in §133.307(d)(3)(A) to specify "in a paper billing format using an appropriate DWC approved billing format."

§133.307(e), (f)(1) and (2):

Comment: In regard to §133.307(e), (f)(1) and (2), a commenter suggests changing the phrase "in which the amount of reimbursement sought" to "in which the amount in dispute sought."

The commenter says that this change will: "(1) ensure that the parties submit all relevant materials to the dispute; (2) deter fraud; (3) deter gamesmanship on the part of some injured workers' and some health care providers; and (4) comply with the Texas Constitution among other reasons."

Agency Response: The Division disagrees with this comment and declines to make a change, because the suggested change would be contrary to Labor Code §413.0311. The Legislature specifically uses the term "amount of reimbursement sought" in Labor Code §413.0311. For this reason, the term has been incorporated into the rule. The Division believes that use of the term in the statute shows Legislative intent that the determining factor for whether a dispute should proceed to SOAH or to a Division CCH is to be the amount of reimbursement sought, and the Division does not believe that it has authority to adopt a different factor on which to make such a determination.

§133.307(e), (f)(1)(B), and (f)(2)(A):

Comment: In regard to §133.307(e), (f)(1)(E)B), and (f)(2)(A), two commenters suggest adding the words "by verifiable means" to the end of each provision. One of the commenter says that this suggestion will: "(1) ensure that the parties submit all relevant materials to the dispute; (2) deter fraud; (3) deter gamesmanship on the part of some injured workers' and some health care providers; and (4) comply with the Texas Constitution among other reasons."

A third commenter offers a similar suggestion, asking that a party's request for an appeal not be considered "timely" unless the copy of the request sent to the opposing party is provided via certified mail. In support of this suggestion, the commenter notes that insurers all too often never receive a copy of a

request to appeal an MDR decision, and that establishing such a requirement as this would encourage compliance.

Agency Response: The Division disagrees with the comments and declines to make a change. These referenced provisions already require a party to send copies of the noted documents to opposing parties, so if the opposing party does not receive the document, it can raise an argument or base an objection on the fact that it did not receive the document. If such an argument is made, the party responsible for sending the documents will already need to show that the documents were sent. Addition of the words "by verifiable means" would not enhance a party's ability to object to documents; it would just create a new issue to be determined, and actually lead to additional "gamesmanship," because a party might have received the documents, but could still argue that it did not receive the document by verifiable means. Additionally, the Division does not see which provision of the Texas Constitution would require such a change.

§307(e)(1):

Comment: A commenter cites §133.307(e)(1), which requires a party to submit additional information to the Division upon a request for such information. The commenter recommends inserting the following sentence into the provision, immediately following the requirement that a party submit the requested additional information no later than 14 days after it is requested: "If the information requested by the Division is not in the possession of the party, the party shall notify the Division within the 14 day time limit."

Agency Response: The Division disagrees with the comment and declines to make a change, because the recommended change is unnecessary and would just add costs for system participants. If a party does not supply additional information to the Division within 14 days of a request for additional information, the Division makes a determination using the information it has. Received notice from a party indicating that the party has no additional information would not change the Division's actions. However, the requirement would create a cost for the party required to send the notice.

Comment: In regard to §133.307(e)(1), a commenter suggests that the Division clarify whether the Division must receive additional information within 14 business days or 14 calendar days.

Agency Response: The Division draws the commenter's attention to 28 TAC §102.3(b). Section 102.3(b) states, "A working day is any day, Monday - Friday, other than a national holiday as defined by Texas Government Code, §662.003(a) and the Friday after Thanksgiving Day, December 24th and December 26th. Use in this title of the term 'day,' rather than "working day" shall mean a calendar day." The Division clarifies that, pursuant to §102.3(b), use of the term "day" means "calendar day."

§133.307(e)(3):

Comment: Two commenters note that §133.307(e)(3) allows the Division to dismiss a request for medical fee dispute resolution, and that §133.307(f) provides that a party to a medical dispute may seek review of the medical dispute resolution decision or dismissal. However, commenters say the provision fails to state what the basis of the appeal would be in the event a request for medical fee dispute resolution is dismissed. The commenters ask that the section be changed to limit the issues in an appeal of a dismissal to only the reason for dismissal. Additionally, the commenters say that the rule does not provide the Division authority to dismiss a request for medical fee dispute resolution upon finding that the disputed health care treatment is not related to the compensable injury or finding that there is no compensable workers' compensation claim.

In regard to these points, one commenter suggests: 1) adding a new basis for dismissal that says the Division may dismiss a request for medical fee dispute resolution if "the Division determines that the dispute health care was provided for an injury that is not compensable," and 2) adding a new subparagraph to the provision that says "An appeal of a Division dismissal shall be limited to the reason the Division has dismissed the dispute."

Agency Response: The Division agrees in part and disagrees in part. The Division has modified §133.307(e)(3)(J) to say that a request for fee dispute resolution may be dismissed if "the Division determines that good cause exists to dismiss the request; including a party's failure to comply with the provisions of this section." The Division agrees that all disputing parties, if known, should receive a copy of a dismissal with the specific reasons for dismissal and it is the Division's procedure to provide copies to all disputing parties. However, the Division does not agree that the appeal of dismissals needs to be addressed in the rule text in §133.307. Instead, issues in a Division contested case hearing are established pursuant to 28 TAC §142.7 of this title (relating to Statement of Disputes), and issues in SOAH hearings are established pursuant to SOAH rules.

The Division agrees that fee dispute resolution would not be appropriate when health care services are found to not be related to a compensable injury. The Division has amended §133.307(e)(3)(J) to say that a request for fee dispute resolution may be dismissed if "the Division determines that good cause exists to dismiss the request; including a party's failure to comply with the provisions of this section." If issues of medical necessity or compensability have already been raised and conclusively adjudicated, no medical necessity exists, or the service is not related to a compensable claim then good cause would exist to dismiss the request for fee dispute resolution.

§133.307(e)(3)(C):

Comment: In regard to §133.307(e)(3)(C), a commenter suggests that the provision creates a conflict with §133.307(f), which does not require an injured employee to seek reconsideration for reimbursement for health care services paid by the injured employee. The commenter says that an injured employee is not required to seek reconsideration for health care services paid, and that dismissal of a request for medical fee dispute resolution based on the injured employee's failure to submit the dispute to the carrier for reconsideration would be inappropriate.

Agency Response: The Division clarifies that §133.307(e)(3) says that the Division "may" dismiss a request for Medical Fee Dispute Resolution for failure to request reconsideration for medical bills submitted. The action of dismissal is discretionary on the part of the Division, and an injured employee is not expected or required to seek request for reconsideration for health care services paid for out of pocket. The requirement for reconsideration is established by 28 TAC §133.250, and is applicable to health care providers, not injured employees.

§133.307(f):

Comment: A commenter cites §133.307(f)(1) and (2), and suggests that the paragraphs be rewritten to clarify that the dollar amount threshold is defined by the amount stated in the initial request for dispute resolution.

Agency Response: The Division disagrees with the comment and declines to make a change, because a change is unnecessary. As proposed, the rule text provides that the determination is based on the amount sought by the requestor in its requests for MDR. A party only files one request for MDR, so it is unnecessary to include the adjective "initial."

Comment: A commenter references §133.307(f)(1)(A) and (2)(A), noting that it provides that a written request for a contested hearing before SOAH or the Division must be filed more than 20 days after the date on which the medical review decision is received before the Division. The commenter also notes that §133.307(f)(2)(B) and §148.3(d) provide that a medical review decision becomes final if not timely appealed. The commenter suggests that party may not be able to meet these time frames in regard to a medical review decision that has been decided prior to the effective date of the adopted rule or a medical review decision that has been remanded. The commenter suggests adding a new paragraph to §133.307(f) which says "A request for a contested case hearing of a MDR decision or dismissal relating to a medical fee dispute that is pending on (effective date of the adopted rule changes) or that is remanded to the Division from a district court without prior review by SOAH shall be considered timely filed if the request is filed with the Division's Chief Clerk by (90 days from the effective date of the adopted rule changes) or no later than the 90th day after the date on which the medical fee dispute is remanded to the Division."

Agency Response: The Division agrees in part, and disagrees in part. The Division agrees that questions might exist in regard to the time frame for a party to file a request for an appeal to a Division contested case hearing when a medical dispute decision was issued between September 1, 2007, and the effective date of the rule. The Division recognizes that this concern is applicable to appeals to Division contested case hearings under both §133.307(f)(2)(B) and §133.308(t)(1)(B)(i). However, the Division does not agree that such a question exists regarding appeals to SOAH contested case hearings, because 28 TAC §148.3 was in effect on September 1, 2007, and it provides the time frame for filing an appeal to SOAH.

The Division does not agree that 90 days is a reasonable amount of time to allow a party with such a decision to file an appeal. The Division has modified §133.307(f)(2)(A) to say, "To request a Division contested case hearing, a written request for a Division contested case hearing must be filed with the Division's Chief Clerk no later than the later of the 20th day after the effective date of this section or the 20th day after the date on which the decision is received by the appealing party . . . ," and the Division has modified §133.308(t)(1)(B)(i) to say "The written appeal must be filed with the Division's Chief Clerk no later than the later of the 20th day after the effective date of this section or 20 days after the date the IRO decision is sent to the appealing party . . . ."

The Division disagrees that a time frame needs to be established for a party to request setting for a remanded dispute, because such a time frame is unnecessary. If the Division receives a court order ordering that a hearing be set for a remanded dispute, the Division will comply with the court order. The Division does not have authority to deny a hearing for a dispute when the dispute has been remanded by a higher court.

§133.307(f)(2):

Comment: Regarding §133.307(f)(2), a commenter suggests that the Division should amend the provision to provide a more efficient dispute resolution process which would avoid multiple contested case hearings on the same claim. To this end, the commenter suggests adding a new subsection that says, "If at the time of the contested case hearing there are additional medical fee disputes between the parties involving the same patient and same date of injury then either party may file a motion or the hearing officer may issue an order to consolidate the additional fee disputes into the medical fee dispute set for contested case hearing." A second commenter also suggests adding this text, along with a provision that says "Failure of the parties to join additional medical fee disputes involving the same patient and same date of injury that could have been made a part of the contested case hearing proceeding will result in a waiver by the party requesting MDR to pursue that disputed issue further." The second commenter asserts that such a change would make the medical dispute resolution system more efficient and would prevent requestors from gaming the system by breaking down large dollar medical dispute into several smaller disputes that would each require a hearing.

Agency Response: The Division disagrees with the comments and declines to make a change. The current dispute resolution process was devised by the Legislature and incorporated into Labor Code §§413.031, 413.0311, and 413.032, and the Division lacks authority to substitute that process with a different dispute resolution process.

Requiring a health care provider to consolidate all medical bills where additional reimbursement is sought before filing with medical dispute resolution would be administratively burdensome, and requiring a coordination of initial bill submissions and requests for reconsideration for different dates of service, just to consolidate a medical dispute, might cause the health care provider to miss a filing deadline.

However, the Division clarifies that nothing prevents a health care provider from combining medical bills for same patient and same claim, with multiple dates of service into one medical fee dispute. If appealed after a medical dispute decision is issued, it would be considered one medical fee dispute for proceedings in a contested case hearing.

§133.307(f)(2)(B):

Comment: In regard to §133.307(f)(2)(B), a commenter says that the section creates two different rules for determination of timely filing without rationale. The commenter says that for appeals to SOAH under 28 TAC §148.3(b), filing in the Central Office, not a field office, is required.

The commenter says that the section also contradicts proposed §133.308(t)(1)(B)(i), relating to IRO appeals to a contested case hearing.

Agency Response: The Division disagrees with the commenter and declines to make a change. The Division notes that two different rules for determination of timely filing are not established, as §133.307(f)(2)(B) is only applicable to contested case hearings before the Division, and 28 TAC §148.3(b) is only applicable to contested case hearings before SOAH.

The Division notes that §133.307(f)(2)(B) does not contradict §133.308(t)(1)(B)(i), as the two sections deal with different types of disputes. However, in response to another comment, the Division has adopted a revised version of §133.308(t)(1)(B)(i) that more closely resembles §133.307(f)(2)(B).

§133.307(f)(2)(B) and §133.308(t)(1)(B)(ii):

Comment: A commenter notes that §133.307(f)(2)(B) allows appeals to be submitted at DWC field offices, but that §133.308(t)(1)(B)(i) requires appeals for medical necessity disputes to be sent to the DWC Chief Clerk. The commenter suggests that for consistency in the place and manner in which one files a dispute, parties be allowed to file disputes in local fields offices, which would then be forwarded to DWC's Chief Clerk for processing.

Agency Response: The Division agrees with the commenter that there should be consistency in how appeals are filed, and the Division agrees to adopt a revised version of §133.308(t)(1)(B)(i) which provides for a party to be able to file a written request for a Division contested case hearing at a local field office of the Division.

§133.307(f)(2)(C):

Comment: A commenter recommends that the provision concerning letters of clerical correction be moved from §133.307(f)(2)(C) and made the sole provision in subsection (f), and that the remaining provisions in proposed subsection (f) be renumbered as subsection (g).

Agency Response: The Division disagrees with this comment and declines to make a change. The Division observes that current placement of the provision regarding letters of clerical correction means that it is only applicable to Division contested case hearings, and notes that the commenter's suggestion would result in the provision being applicable to both SOAH hearings and Division contested case hearings. However, it is unnecessary to make the provision regarding letters of clerical correction applicable to SOAH hearings, because 28 TAC §148.3(e) already provides a provision regarding letters of clerical correction that is applicable to SOAH hearings. For this reason, the recommended change would be redundant, and would possibly result in a conflict between §133.307 and §148.3.

Comment: In regard to §133.307(f)(2)(C), a commenter recommends that the sentence, "Prior to a Division contested case hearing, either party may request a clerical correction of an error in a decision," be rewritten as, "Prior to a Division contested case hearing, either party may request a correction of a clerical error in a decision."

The Commenter also recommends that the sentence, "Only the Division can determine if a clerical correction is required," be rewritten as, "The Division shall determine if a clerical correction is required."

Finally, the commenter recommends that the sentence, "A request for clerical correction does not alter the deadlines for appeal" be rewritten as, "A request for a correction of a clerical error does not alter the deadlines for appeal."

The commenter asserts that the recommended changes will "(1) ensure that the parties submit all relevant materials to the dispute; (2) deter fraud; (3) deter gamesmanship on the part of some injured workers' and some health care providers; and (4) comply with the Texas Constitution among other reasons."

Agency Response: The Division agrees in part and disagrees in part. The Division does not see how the recommended changes address submission of relevant materials or how they would deter fraud or gamesmanship, and the Division does not understand which provision of the Texas Constitution would require such changes. However, the Division does agree to make the first and third recommended text changes.

The Division declines to make the second recommended change, because it would change the meaning of the text. As proposed, the text indicates that allowing a party to request correction of a clerical error does not confer onto the party the ability to determine that a clerical error is required. However with the commenter's suggested change, the text would no longer impart that information; instead, the text would state that the Division has a duty to make a determination regarding the need for a correction of clerical error.

§133.307(f)(2)(D):

Comment: A commenter quotes proposed §133.307(f)(2)(D) and asserts that the provision conflicts with the Texas Constitution; the case of *Hartford Cas. Ins. Co. v. State,* 159 S.W.3d 212, 216 (Tex. App.-Austin 2005, pet filed); Labor Code §413.031; and the Administrative Procedure Act. The commenter also says that the Honorable Travis County District Judge Stephen Yelenosky has ruled that parties are entitled to full contested case hearings under the Texas Constitution.

The commenter says that the Texas Constitution and both statutes require a contested case hearing be held as a *de novo* proceeding in which the Division conducts a formal hearing, takes witness testimony, and rules on objections to evidence. The commenter says that because of this, it is appropriate to allow a party to have an opportunity to offer evidence in a formal contested case process that allows for discovery, witness testimony, and cross-examination.

The commenter notes that a party is required to present a request for review at a level below the Division contested case hearing. The commenter says that withholding information is inconceivable, because trying a contested case is a waste of time and resources if the dispute could be resolved at the more informal agency.

The commenter concludes by asking that the Division withdraw the proposal and comply with the laws of the state.

Agency Response: Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D). The subparagraphs in §133.307(f)(2) have been renumbered as appropriate.

Comment: A commenter expresses belief that limiting the evidence that may be presented at a contested case hearing is a violation of the due process provisions in the state and federal Constitutions, and says that that the Division should make all efforts to ensure a complete, full, and fair hearing at the contested case level. The commenter says that the proposed evidentiary limitations are arbitrary and capricious.

The commenter also says that evidentiary limitations are problematic because on the independent review level, parties do not exchange what is sent to the IRO, so do not know what evidence the contested case hearing may be limited to and will not be able to make timely, valid objections to exhibits at a contested case hearing.

As a third point, the commenter says that constitutional issues may be raised concerning cases filed before the adoption of the rule, because the parties in those cases would not have been put on notice that their filings will limit what evidence can be presented at a contested case hearing. The commenter says that proposed evidentiary limitations specifically apply retroactively without fair notice being provided to the parties.

The commenter concludes by saying that by generally prohibiting new evidence at a contested case hearing and by allowing hearing officers to determine good cause, there will be less certainty in the system because one hearing officer's determination of good cause may be different from another hearing officer's opinion. The commenter suggests that for this reason, all evidence offered and the testimony of all identified witnesses should be allowed into evidence at a contested case hearing.

Agency Response: Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D). The subparagraphs in §133.307(f)(2) have been renumbered as appropriate.

Comment: A commenter quotes proposed §133.307(f)(2)(D) and asserts that the proposed rule goes against public policy because it restricts parties from presenting claims and defenses, and presenting information that may arise in the supplemental exchange that the opposing party may not have had sufficient opportunity to address through additional documentation. Further, the commenter believes that there is a due process problem if a party has insufficient opportunity to investigate and respond to the allegations which may arise in the supplemental exchange, and by having rules different from SOAH, encourages parties to "game the system" to obtain MDR through the agency with the most beneficial rules. The commenter suggests that DWC adopt SOAH's dispute resolution rules for consistency and continuity.

Agency Response: The Division agrees to not adopt proposed §133.307(f)(2)(D). The subparagraphs in §133.307(f)(2) have been renumbered as appropriate.

Comment: A commenter states that proposed §133.307(f)(2)(D) fails to provide parties with adequate due process because it does not provide for a full evidentiary hearing, with the right to present witnesses, to cross-examine witnesses, and issue subpoenas to compel attendance. The commenter also states that the proposed rules offer determinations based solely on unverified documents. Commenter asserts that to allow the parties to develop a full record and fairly present their case as well as ensure that determinations in contested case hearings are accurate and of high quality, it is essential that parties be able to call all witnesses with relevant information on the dispute and not be limited to witnesses identified in unverified documents, and parties must also have the right to subpoena witnesses and documents.

The commenter asserts Labor Code §401.021 provides that a proceeding, hearing, judicial review, or enforcement of a commissioner order, decision or rule is governed by Subchapter D of the APA. The commenter notes that Subchapter D includes application of rules of evidence, the right to cross examine, testimony of witnesses taken under oath, issuance of subpoenas, discovery and other due process requirements. The commenter states that medical disputes must be resolved according to the provisions of the APA made applicable to the division and failure to conduct proper hearings on medical disputes violates the parties' due process rights and the division's statutory duties.

The commenter recommends that proposed §133.307(f)(2)(D) be deleted and in its place should be inserted a new section granting the parties the right to a full evidentiary hearing, with the right to present witnesses, cross-examine witnesses, and issue subpoenas to compel attendance.

As an alternative to completely deleting and replacing the paragraph, the commenter suggests deleting from the paragraph the words "disclosed in said documentary evidence during the medical fee dispute under this subchapter except upon a showing of good cause. Parties may not raise issues regarding liability, compensability, or medical necessity at a contested case hearing for a medical fee dispute."

Agency Response: The Division disagrees with the comment, and declines to make the recommended change to insert new a section regarding an evidentiary hearing with the right to present witnesses, cross-examine witnesses, and issue subpoenas to compel attendance.

The commenter bases its recommendations on the provisions of Labor Code §401.021, stating that this section makes the APA applicable to contested case hearings, and that therefore the rules of evidence are applicable in contested case hearings. However, the commenter disregards the limiting statement "Except as otherwise provided by this subtitle," which is in Labor Code §401.021. It is actually Labor Code §410.003 (relating to Application of Administrative Procedure Act) and §410.153 (also relating to Application of Administrative Procedure Act) that say how the APA applies to Division Contested Case hearings. These sections leave applicability of the APA to the Commissioner's discretion, and pursuant to the Commissioner's rule at 28 TAC §142.1 (relating to Application of the Administrative Procedure Act), only Government Code §2001.201 (relating to Enforcement of Subpoenas) is applicable to Division contested case hearings.

The Division agrees to not adopt proposed §133.307(f)(2)(D); however, the Division declines to insert a new section granting the parties a right to a full evidentiary hearing, with the right to present witnesses and issue subpoenas to compel attendance. Twenty-eight TAC Chapter 142 rules address benefit contested case hearings and the specific issues of concern to the commenter. As such, no additional rules are required.

Comment: A commenter recommends removing the provisions which limit the documentary evidence and witnesses to those disclosed in the MFD except upon a showing of good cause. The commenter believes that limiting the evidence in this way will keep employees from submitting evidence in addition to that submitted by the carrier. The commenter further believes that this limitation would raise due process issues and be contrary to *HCA Healthcare Corp. v. Texas Dept. of Ins. and Division of Workers' Compensation,* (Cause No. D-1-GN-06-000176). Further, the commenter asserts this would be contrary to the intent of HB 724 and the focus should be on making the best decisions with all of the relevant evidence.

Agency Response: Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D).

Comment: A commenter states that proposed §133.307(f)(2)(D) limits the evidence that may be considered during the course of a DWC contested case hearing and is contrary to the intent of HB 724 and the district court decision that found §413.031 of the Labor Code (as amended by HB 7) unconstitutional.

The commenter asserts that the development of a record of review includes the filing of documentary evidence and presentation of witnesses - while the medical dispute fee resolution and the medical necessity informal review processes are part of a very informal process that both merely involve paper reviews of disputed issues presented to the agency for review and resolution and do not afford a hearing officer who considers the evi-

dence introduced and witnesses presented by the disputing parties.

The commenter states the proposed rule defeats the purpose of disputing parties having a right to a hearing where they can develop their record of review as was contemplated by the Texas Legislature when HB 724 was passed.

The commenter states HB 7 attempted to streamline the medical dispute resolution process by eliminating the State Office of Administrative Hearings (SOAH) appeal process that was set out in §413.031 of the Labor Code. Further, an Austin district court judge subsequently invalidated §413.031(k) of the Labor Code as amended by HB 7 and the court's decision declared §413.031(k) was facially unconstitutional because it failed to afford parties to a medical dispute brought under §413.031 of the Labor Code and pending before the DWC with an opportunity for a hearing in which witnesses are sworn and the parties can rebut adverse evidence and cross-examine adverse witnesses before a final order is issued. Commenter states the judge ruled that parties are entitled to full contested case hearing under the Texas Constitution.

The commenter asserts the Texas Legislature passed HB 724 to provide disputing parties with the right to a hearing and the filing of HB 724 was in response to the district court ruling and system stakeholder requests for this issue to be rectified.

The commenter asserts that limiting the evidence and witnesses that may be presented by disputing parties at a DWC contested case hearing would create the same constitutional issue that resulted in the invalidation of §413.031 of the Labor Code as it was amended by HB 7 and would constitute a disregard of the will of system stakeholders who sought a legislative fix to the invalidation of §413.031 of the Labor Code and the right to an administrative law hearing where they may present all of the evidence and witnesses they wish to have considered by the hearing officer.

The commenter states that this proposed rule provision is in conflict with the Texas Constitution, *Hartford Cas. Ins. Co. v. State,* 159 S.W.3d 212, 216 (Tex. App.-Austin 2005, pet filed), the agency's organic statute, §410.163, §413.031, other sections of the Labor Code, and the Administrative Procedure Act. The commenter asserts that under the Constitution and both statutes, the contested case hearing is a *de novo* proceeding; the Division shall conduct a formal hearing, take witness testimony, and rule on objections to exhibits; thus, it is appropriate to allow a party to have an opportunity to offer evidence in a formal contested case process that allows for discovery, witness testimony, and cross-examination.

The commenter states that the parties, which are required to present their requests for review to the Division before obtaining a hearing at the Division, will continue to present pertinent information at that stage; trying a contested case would be a waste of time and resources if the dispute could be resolved at the more informal agency level. Further, while it is conceivable that a party may withhold information at the first level of review, it is not clear what would be gained by doing so.

The commenter believes other factors, such as the informality of the Division process, the delay in a final decision created if a party appeals a decision, and the expense of a formal contested case hearing, all encourage a party to use the Division process and contribute to the low appeal rate. The commenter asserts that §410.163(b) of the Labor Code provides that a hearing officer shall ensure the preservation of the rights of the parties and the full development of facts required for the determinations to be made.

The commenter requests that DWC amend the rule to provide the disputing parties with the right to submit evidence and witnesses for consideration by the contested case hearing officer. Further, the rule should also require the disputing parties to exchange their documentary evidence and list of witnesses within a specific time frame prior to the contested case hearing.

The commenter requests that the rule provide the contested case hearing officer with the authority to direct the independent review doctor to review any new evidence and issue an addendum report to his original report and the rule should provide that the IRO shall be paid $150 by the party that was responsible for the original IRO fee.

The commenter requests that §133.307(f)(2)(D) be revised to say: "At a Division contested case hearing under this paragraph, the parties shall be limited to documentary evidence exchanged and to witnesses reasonably disclosed in the manner provided by this subtitle. Parties may not raise issues regarding liability, compensability, or medical necessity at a contested case hearing for a medical fee dispute.

"(1) The parties to a Division contested case hearing shall exchange their documentary, other relevant evidence, and list of witnesses 14 days before the contested hearing.

"(2) A party who sends a document relating to a benefit contested case hearing to the Commission shall also deliver copies of the document to all other parties, or their representatives or attorneys. Delivery shall be accomplished by presenting in person, mailing by first class mail, facsimile or electronic transmission. The document sent to the Commission shall contain a statement certifying delivery. The following statement of certification shall be used: "'I hereby certify that I have on this _____ day of _____, _____, delivered a copy of the attached document(s) to (state the names of all parties to whom a copy was delivered) by (state the manner of delivery).'

"(3) The contested case hearing officer shall issue an order and direct the informal review organization to review any new medical evidence and issue an addendum report to the original IRO report. The party that was responsible for paying the initial IRO fee shall be ordered by the contested case hearing officer to pay an additional fee.

"(A) The party responsible for paying the initial IRO fee shall pay the IRO an addendum IRO report fee of:

"(i) $150 for review of up to 50 pages of additional medical evidence; or

"(ii) $200 for review of more than 50 pages of additional medical evidence.

"(B) The hearing officer shall abate the contested case hearing until such time the IRO completes the review of the new medical evidence.

"(C) The IRO shall complete the review of the additional medical evidence no later than 7 business days after receipt of the medical evidence and hearing officer order.

"(i) The review of the additional medical evidence shall be used to clarify and/or correct the initial IRO report.

"(ii) The IRO shall forward the addendum report to the representatives of the disputing parties and the contested case hearing officer.

"(iii) The contested case hearing officer shall reset the hearing upon receipt of the IRO's addendum report.

"(4) The Division may take enforcement action against a party who is deemed to have a pattern of practice of withholding evidence and offering the withheld evidence at a contested case hearing."

Agency Response: Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D).

The Division disagrees with the commenter's recommended text additions, and declines to make the recommended changes because the areas covered by the recommended changes are addressed by 28 TAC Chapters 140 and 142.

Comment: A commenter recommends modifying §133.307(f)(2)(D) to say: "At a Division contested case hearing under this paragraph, the parties shall be limited to documentary evidence exchanged and to witnesses reasonably disclosed during the medical fee dispute under this subchapter including the prehearing and hearing process except upon a showing of good cause. Good cause is shown if an ordinarily prudent person would not have exchanged the documentary evidence or listed the witness under the same or similar circumstances." The commenter says these recommendations would (1) ensure that the parties submit all relevant materials to the dispute; (2) deter fraud; (3) deter gamesmanship on the part of some injured workers' and some health care providers; and (4) comply with the Texas Constitution among other reasons.

Agency Response: Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D). The Division declines to accept the commenter's definition of "good cause," as well as additional language for this section, since the Division has chosen to delete this section from the rule.

§133.307(f)(2)(D) and §133.308(t)(1)(B)(v):

Comment: In regard to submitting evidence at the MDR level, a commenter says it is not unusual for the parties to submit whatever information they have readily available, but that they do not submit testimony from doctors and get separate reports from them at that stage. The commenter states the reason for this is because 99 percent of the time, the problem will be resolved without going through that expense, time, and effort. The commenter states the parties will resolve those things, or the Division will make a determination and resolve them. The commenter states a full hearing cannot be had at the MDR level and the parties have a right to a full hearing.

The commenter states that oral testimony and cross-examination are not available at the initial MDR stage.

The commenter asserts the information in the treating doctor's records may or may not be correct and until a party is able to cross examine the doctor and the patient in the presence of a Hearing Officer, those issues rarely come out. The commenter asserts the contested case hearing is an opportunity to air those discrepancies.

Agency Response: Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D) and §133.308(t)(1)(B)(v). The clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

Comment: A commenter expresses opposition to subsection (f)(2)(D) of §133.307 and subsection (f)(1)(B)(v) of §133.308 which would limit the evidence in a contested case hearing to the documentation that was filed during the medical dispute resolution process.

The commenter states that the stakeholders view the entire process of medical dispute resolution as a very informal process because there is no opportunity to present evidence in front of a Hearing Officer, perform discovery, or present witnesses. The commenter states HB 7 amended §413.031(k) of the Labor Code in an attempt to streamline the medical dispute process; however, a Travis County District Court Judge ruled the statute was facially unconstitutional because the provision did not provide the parties with opportunity for an administrative law hearing in which they could develop their record by presenting all their evidence, present witnesses, and conduct cross examination and discovery.

The commenter states that Representative Burt Solomons filed HB 724 to try to rectify this problem.

The commenter asserts that there can be no doubt that the parties should be able to present their full case at a contested case hearing since the medical dispute process is not the type of process in which you can devote their record.

The commenter thinks providers will begin to take their entire medical record and throw it at the IRO and dump it into the mix for the medical fee dispute process which adds unnecessary paper flow in the system.

The commenter suggests that evidence should not be limited because new medical evidence could occur that may be relevant to the dispute, which if not allowed to be introduced could result in health care being denied.

The commenter states the opposite is true as well, if that evidence the carrier may develop in the interim is not allowed to be introduced, health care may be delivered that could injure an employee or even cripple an injured employee if not costing their life. The commenter asserts that is what happened in a lot of the spinal surgery cases back in the '90s.

The commenter states most medical bills (75 to 80 percent) are actually paid, or, do not file a dispute and only a small percentage go to dispute resolution. The commenter states even a smaller number would proceed to a contested case hearing. The commenter states that is why the commenter is perplexed as to why the Division is even considering a provision to limit evidence when it would set up a situation very similar to the reality that was faced when HB 7 had §413.031(k) struck down as being facially unconstitutional because it deprived the parties of the right to have that hearing to develop their full record. The commenter asserts the proposed rule provisions would have the same effect.

Agency Response: Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D) and §133.308(t)(1)(B)(v). The clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

Comment: A commenter is opposed to subsection (f)(2)(D) of §133.307 and subsection (f)(1)(B)(v) of §133.308, which would limit the evidence in a CCH to the documentation that was filed during the medical dispute resolution process.

The commenter states that DWC does not appear willing to apply or follow the traditional rules of evidence for Texas in contested case hearings. The commenter states that the medical dispute fee resolution and medical necessity informal review processes

are part of a very informal process and are merely paper reviews of disputed issues. The commenter states that in the medical dispute resolution process, there is no hearing officer who considers the evidence introduced and witnesses presented by the disputing parties. The commenter states the proposed rule provision would defeat the purpose of disputing parties having a right to hearing where they can develop their record of review as was contemplated by the Texas Legislature when HB 724 was passed and the development of a record of review includes the filing of documentary evidence and presentation of witnesses.

The commenter states the State Office of Administrative Hearings (SOAH) applies and follows the rules of evidence when conducting an MDR hearing and DWC's failure to apply the rules of evidence in a medical contested case hearing will create two different standards of review for the same types of medical disputes and same or similar issues. Commenter asserts that this is confusing to system stakeholders, and will result in inconsistent decisions being issued and will allow inappropriate evidence to be considered during the medical contested case hearing.

The commenter suggests that limiting the evidence and witnesses that may be presented by disputing parties at a DWC contested case hearing would create the same constitutional issue that resulted in the invalidation of §413.031 of the Labor Code as it was amended by HB 7. Commenter states that such an act would also constitute a disregard of the will of system stakeholders who sought a legislative fix to the invalidation of §413.031 of the Labor Code and the right to an administrative law hearing at which they may present all of the evidence and witnesses they wish to have considered by the hearing officer. The commenter states the Texas workers compensation system needs some long term continuity in this regard.

Agency Response: The Division has not adopted proposed §133.307(f)(2)(D) and §133.308(t)(1)(B)(v). The clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

The Division disagrees with the commenter in regard to applicability of the Administrative Procedure Act (APA) to Division contested case hearings, and declines to make a change to make the APA applicable to Division Contested case hearings. Additionally, the Division declines to make SOAH's rules applicable to Division contested case hearings; when the Legislature chose to establish a bifurcated system for appealing fee dispute and IRO decisions, it was aware that SOAH and the Division are regulated by different statutes and have different rules. However, the Legislature expressly stated that certain appeals are to be "conducted by a hearings officer in the manner provided for contested case hearings under [Labor Code] Subchapter D, Chapter 410," and the Division is not going to attempt to circumvent through rule the Legislature's intentions.

Labor Code §410.003 (relating to Application of Administrative Procedure Act) and §410.153 (also relating to Application of Administrative Procedure Act) says how the APA applies to Division Contested Case hearings. These sections leave applicability of the APA to the Commissioner's discretion, and pursuant to the Commissioner's rule at 28 TAC §142.1 (relating to Application of the Administrative Procedure Act), only Government Code §2001.201 (relating to Enforcement of Subpoenas) is applicable to Division contested case hearings.

Comment: A commenter is opposed to §133.307(f)(2)(D) and §133.308(t)(1)(B)(v) and states that the rules' limitation on evidence except for good cause denies the parties the due process that HB 724 was meant to address.

The commenter asserts that the MDR/IRO process is entirely a "paper" review where neither party appears before the agency to present anything and witnesses play no role in the process. The commenter asserts there is no reason for a party to identify witnesses at the dispute level and there is no reason a party would do so. The commenter states that most witnesses will be expert witnesses which are different from fact witnesses and are identified at a later time for the purpose of offering testimony. The commenter asserts that expert witnesses will not be known or designated at the time of the MDR/IRO filings, no discovery will have been (or can be) conducted and all relevant documents will not be known. The commenter states that it is the purpose of the hearing to develop and present the relevant evidence and the proposed restrictions on evidence are a denial of state and federal due process.

The commenter states that in the bill analysis to HB 724 the Legislature made clear that the purpose of re-introducing the right to an administrative hearing was in part because "there was no administrative record to review if and when such disputes were appealed to court." The commenter believes that the Legislature did not believe the limited record produced in the medical dispute was adequate. The commenter suggests that limiting the evidence to the MDR/IRO filings will produce an inadequate administrative record.

The commenter asserts that a similar predecessor Commission rule (§148.18(a)) lead to needless, time-consuming litigation over what constituted "good cause", rarely resulted in more efficient hearings and, in fact, caused lengthier hearings and was abandoned by SOAH.

The commenter notes that the evidence listed in clause (v)(I) - (VIII), does not include documents submitted by the provider to the IRO.

Agency Response: Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D) and §133.308(t)(1)(B)(v). The clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

Comment: A commenter is opposed to §133.307(f)(2)(D) and §133.308(t)(1)(B)(v). Commenter asserts a similar rule was proposed by SOAH, but was rejected by SOAH because it denied a fair hearing.

The commenter states every hearing officer, individually, determines what "good cause" is and refers to his written comment that contains his suggested definition for "good cause." The commenter is opposed to the proposed rules because he would not be able to offer any learned treatises on medical procedures or treatment.

The commenter states that under the proposed rules, discograms would not be admissible at the hearing because they were not used at the medical dispute resolution process.

The commenter states that often a party's attorney would not get the file until after it was sent to SOAH, so, the reality is that the attorney may not have been involved or hired before medical dispute began. The commenter states that, effectively, there has been no assistance of counsel on the carrier or provider's side and may not realize they have left something out or they should have tried to discover other items before they could get started in the contested case.

The commenter suggests that all discovery be allowed, including requests for admission, requests for production, requests for disclosure, interrogatories, and depositions.

The commenter expresses concern that he may not be allowed to call or cross-examine an expert witness who was not disclosed at the MDR. The commenter also expresses concern that there will be two different procedures to handle the same sort of dispute; SOAH could offer a de novo hearing while the Division does not. The commenter believes that what will occur at the Division is a contested case hearing officer will only do a substantial evidence review and upon further appeal only another substantial evidence review will occur without a full contested hearing. The commenter states he is in agreement with Ron Beal's comments.

The commenter asserts that if the Division is going to allow discovery, there should be sanctions if the other side does not respond to discovery and there should be a process, if necessary, to allow extensions of time for people to conduct discovery.

The commenter states that when evidence is allowed in at a de novo hearing the same rules should apply to any party who wants to put on evidence.

Agency Response: Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D) and §133.308(t)(1)(B)(v). The clauses in §133.308(t)(1)(B) have been renumbered as appropriate. The Division notes that discovery is allowed pursuant to the provisions in 28 TAC Chapter 142, and declines to establish duplicate provisions in these sections.

Comment: A commenter agrees with other comments concerning admissibility of documentary evidence submitted at contested case hearings and believes that everyone wants a complete record. The commenter believes the proposed rules give too much discretion to the hearing officer regarding admission of evidence.

Agency Response: Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D) and §133.308(t)(1)(B)(v). The clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

§133.307(f)(2)(D) and §133.308(t)(1)(B)(v)(i) - (vii):

Comment: A commenter indicates that, by limiting the admissibility of evidence to that which was considered during the MDR determination, the proposed rules undermine the hearing officer's role as the sole judge of the relevance and materiality of evidence, as well as jeopardizing the hearing officer's ability to fully develop the record.

The commenter further notes that the proposed sections are in conflict with the controlling statutes in Labor Code Chapter 410. In particular, the rules fail to include specific requirements for the parties to disclose "the identity and location of any witness known to the parties to have knowledge of relevant facts or to submit any witness statements or to provide photographs." The commenter says that a party has a statutory right to be provided with this information under Section §410.160. The commenter is concerned that parties submitting information in the MDR process may avoid the statutory duty set forth in §410.160.

The commenter also urges that the reason that the Legislature provided for parties to obtain information through interrogatories and depositions is to allow for parties to learn of and call additional witnesses at the hearing or to discover and submit additional documents at the hearing. These are things that would not be available at the time of the MDR determination process.

The commenter takes issue with the concept of "good cause" for admitting additional documents or allowing additional witnesses. The commenter states that it is ambiguous as to what constitutes "good cause." The commenter believes that the test for admitting evidence should be if it was discovered during the discovery process and is relevant to the determination of the case.

The commenter further argues that legislative intent to provide an informal, low-cost method of resolving medical fee disputes is undermined by the proposed rules. For example, since evidence admitted and witnesses disclosed is limited to that which was considered during the MDR determination, the commenter argues that the carrier may be required to retain an expert witness for every MDR dispute in the event that the case goes to contested case hearing.

Two other commenters express agreement with the comments made by this commenter.

Agency Response: The Division agrees in part and disagrees in part. The Division disagrees that the controlling statute is located in Insurance Code Chapter 410. Rather, the controlling statute is Labor Code §413.0311, which provides for hearings "conducted by a hearings officer in the manner provided for contested case hearings under Subchapter D, Chapter 410" of the Labor Code.

Based on the numerous comments received regarding limitations on evidence, the Division did not adopt proposed §133.307(f)(2)(D) and §133.308(t)(1)(B)(v)(i) - (vii). The clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

§133.307(f)(2)(E):

Comment: A commenter recommends adding the following text to the end of §133.307(f)(2)(E) as follows:

"Additional exceptions are:

"(i) Requests for Admission, Requests for Disclosure and Requests for Production may be used to establish facts, obtain information and obtain documents. Requests for Admission, Requests for Disclosure and Requests for Production shall be served no later than 30 days before the contested case hearing, unless otherwise agreed. Responses shall be exchanged no later than ten days after receipt of the propounded Requests;

"(ii) A party who sends a document relating to a contested case hearing to the Division or to another party, or its representatives or attorney shall do so by verifiable means. Any document sent to the Division relating to a contested case hearing shall contain a statement certifying delivery. The following statement of certification shall be used: 'I hereby certify that I have on this day of _____,_____ delivered a copy of the attached document to (state the names of all parties to whom a copy was delivered) by (state the manner of delivery);' and

"(iii) The failure to timely respond to Interrogatories, Requests for Admission, Requests for Disclosure or Requests for Production shall result in the preclusion of evidence by the party required to respond."

Agency Response: The Division declines to accept the commenter's additions to §133.307(f)(2)(E), because the issues the commenter addresses are covered in 28 TAC Chapter 142.

§133.307(f)(2)(F):

Comment: In regard to §133.307(f)(2(F), a commenter recommends offering both the time frame and venue for appeal within the text of the section. The commenter says that providing the 30 day time frame and identifying venue in Travis County within the text of the rule would provide for a clear manner and would properly inform injured employees of their right to appeal.

Agency Response: The Division disagrees with the comment and declines to make a change, because such a change is not necessary and would not be in keeping with the way other Division rules address appeal under the Government Code; for instance, 28 TAC §148.15(f) provides that appeal of a SOAH contested case hearing that follows an IRO review is conducted "in accordance with the APA, §§2001.171, 2001.174, and 2001,176." The Division notes that access to the Government Code is available via the internet through the State of Texas website, and the Office of Injured Employee Counsel is available to provide assistance and guidance to injured employees who do not understand the processes under these sections.

Comment: A commenter says that §133.307(f)(2)(F) sets out the information that must be included in a petition for judicial review. The commenter says that the petition for judicial review should include more specific information that will assist the Division and other parties with matching a petition for judicial review to the underlying claim and medical dispute resolution decision, and recommends that in addition to requiring Division tracking numbers for the filed dispute, there also be a requirement for a specific insurer number which would be placed on all documents.

Two commenters offer similar suggestions, suggesting that a clause be added to the list for "the carrier claim number" or "the insurance carrier claim number." These two commenters also suggest that the words "The DWC number(s) for the dispute being appealed" be replaced with the words " DWC claim number" or "the DWC MDR tracking number(s) for the dispute being appealed," and one of these commenters suggests that the petition number only be required "if known." The other commenter asserts that the recommended changes will "to: (1) ensure that the parties submit all relevant materials to the dispute; (2) deter fraud; (3) deter gamesmanship on the part of some injured workers' and some health care providers; and (4) comply with the Texas Constitution among other reasons."

Agency Response: The Division disagrees with the comments and declines to make the recommended changes. The Division clarifies that the listed information is not necessarily required to be in a petition, but must be provided in a cover letter if not in the petition. The Division notes that it is the rules of civil procedure and local court rules that dictate what must be in a petition for judicial review.

The purpose of this provision is simply to ensure that the Division has sufficient information concerning an appeal to be able to assemble the correct administrative record for use by the District Court. The recommended changes would not further this goal; for instance, the Division does not need a carrier's internal claim number. Additionally, if a party does not know the petition cause number for a case it has filed, it should contact the district clerk's office and get the number before serving a copy of the petition on the Division.

The Division does not see how making the recommended change would ensure that the parties submit all relevant materials to the dispute, deter fraud, or deter gamesmanship. Additionally, the Division does not see which provision of the Texas Constitution would require such a change.

The Division's staff has determined that the list of information in §133.307(f)(2)(F) as proposed is sufficient for the Division to be able to assemble an administrative record.

Comment: In regard to §133.307(f)(2)(F), a commenter recommends that the sentence, "The parties will be deemed to have received the decision as provided in §102.5 of this title," be deleted. The commenter also recommends that in the sentence which reads, "A decision becomes final and appealable when issued by a Division hearing officer," the words "hearing officer" be replaced with the words "and received by the party."

The commenter asserts that the recommended changes will "to: (1) ensure that the parties submit all relevant materials to the dispute; (2) deter fraud; (3) deter gamesmanship on the part of some injured workers' and some health care providers; and (4) comply with the Texas Constitution among other reasons."

A second commenter also recommends deleting the words "hearing officer" in stating that Division hearing officers are employed by the Division of Workers' Compensation, therefore the decisions issued by hearing officers are decisions of the Division.

Agency Response: The Division disagrees with the comments and declines to make a change. The purpose of this provision is to provide a calculable time at which a decision of a hearing officer becomes final and appealable, so that parties can determine when the time frames in Subchapter G of Chapter 2001 of the Government Code become applicable. The recommended changes would insert uncertainty into this process, and possibly lead to further dispute regarding the time frame for a party to appeal to district court. Additionally, the Division does not see how the recommended changes address submission of relevant materials or how they would deter fraud or gamesmanship, and the Division does not understand which provision of the Texas Constitution would require such changes.

The Division agrees that a Division hearing officer is a Division employee, and thus a decision made by a Division hearing officer is a decision of the Division. However, the Division disagrees with the second commenter's suggestion and declines to make the recommended change. While the decision may be a Division decision, the hearing officer is the person who actually examines evidence and makes a decision on behalf of the Division, and the hearing officer is the person who actually issues the decision on behalf of the Division. The specific point when the hearing officer actually issues the decision has been selected as the point when a decision becomes final and appealable, but use of the amorphous phrase "when issued by the Division" would not convey this intent.

§133.308:

Comment: A commenter says that it is critical that an IRO reviewer do the following with each report:

1) Attach a resume to the report, including the date of last clinical practice and ratio of current clinical practice compared to peer or IRO reviews and independent medical examination (IME) opinions.

2) Sign with the reviewer's own name and contact information.

3) If care is denied to an injured employee, be available to provide cross examination and testimony at all hearings at no cost to the injured employee, because the reviewer is paid a high fee for the review, and the fee should carry with it the responsibility to explain and defend it.

The commenter says that there is no substitute for the IRO, and that the reviewer should do his own exams, rather than using a designated doctor for exam by proxy. The commenter notes that an IRO reviewer has a huge responsibility, since his opinion has weight over other qualified doctors.

In addition, the commenter says that the same rules and qualifications as newly stated for IROs should also apply to IME, required medical examination (RME), and peer review doctors.

Agency Response: The Division disagrees with this comment. The Division clarifies that pursuant to Insurance Code §4202.009 "Information that reveals the identity of a physician or other individual health care provider who makes a review determination for an independent review organization is confidential." As such, the Division does not have the authority to require an IRO reviewer to attach identifying information to a decision or to be available to provide testimony in a hearing. Because of this, proposed §133.308(t)(1)(B)(ii) expressly provides that "The IRO is not required to participate in the Division CCH or any appeal," and proposed §133.308(u)(4) expressly provides that "The IRO is not required to participate in the CCH or any appeal." The Division adopts these provisions as proposed. Additionally, to further clarify that an IRO is not required to participate in an hearing or any appeal, the provision "The IRO is not required to participate in the SOAH hearing or any appeal" has been incorporated into and adopted in §133.308(t)(1)(A).

In response to commenter's comment concerning exams, the Division notes that Insurance Code §4202.009 would prevent it from requiring an IRO reviewer to personally perform exams - meeting with an injured employee in person to conduct an exam would likely reveal the identity of the health care provider making the review determination for the IRO.

Finally, the Division notes that this rule is not applicable to IME, RME, or peer review doctors. As such, the Division declines to make any changes that would be applicable to them. Such changes would expand applicability of these sections beyond the intent of the Division, and would constitute a substantial change, as it would affect individuals who would not have been impacted by the rule as proposed.

Comment: In regard to §133.308, a commenter suggests that the provisions should require that care be rendered immediately, and that disputes be processed afterward; that spinal surgeons be required to be board certified by the American Board of Spine Surgeons; and that injured workers be able to sign Health Insurance Portability and Accountability Act (HIPAA) forms at all examining doctor visits and receive a copy of the complete file on the spot, so as to avoid undue influence by carriers. The commenter says that requiring immediate care would reduce costs to both injured workers and carriers.

Agency Response: The Division disagrees with the comment and declines to make any changes.

The Division declines to make the first recommended change, because it lacks statutory authority to do so. The Division notes that Labor Code §413.014 requires preauthorization in certain instances; therefore, the Division does not have statutory authority to develop a process beyond what the statute requires.

In regard to the second recommended change, the Division notes that subsection (d) addresses professional specialty requirements. However, The Division declines to make the second recommended change, because it would not be advisable to reference specific specialties in this rule. There are numerous fields of medicine that may be relevant to an injured employee, and it would be difficult, to address each one on an individual basis in this section. If the Division attempted to make such a list in this section, but left a field off, there would be questions as to the applicability of professional specialty requirements for that field.

In regard to the third recommended change, the Division notes that the rule proposal did not addressed in-person examinations. As such, it would be a substantial change if provisions were added to address the process for receiving records during an in-person examination.

Comment: In regard to §133.308, a commenter says that there should be a difference between the IRO process for group health and worker's compensation, and that it is not appropriate to match the two up. The commenter says that the fist reason they should not be matched up is that group health is not workers' compensation. The commenter notes that workers' compensation has income benefits, maximum medical improvement, and impairment ratings. The commenter also says that court told us there is a different process when it ruled Labor Code §413.031(k) unconstitutional, and that the Legislature obviously agreed with the analysis of the court by introducing and actually passing HB 724. The commenter says that it would be nice if one could match up the health and workers' compensation process, but obviously one cannot.

The commenter suggests that the standards for group health could be challenged in court, and says that it is important to note that the Legislature intended to fix the workers' compensation process by providing for a hearing which is governed by the Administrative Procedure Act, and that under the Administrative Procedure Act parties are entitled to present their cases in full, subject to objections by other parties and relaxed rules of evidence.

Agency Response: The Division disagrees with the comment and declines to establish a process for workers' compensation IRO reviews that is different from IRO reviews conducted under the Insurance Code, because it does not have statutory authority to do so. Labor Code §413.031(d) expressly provides "A review of the medical necessity of a health care service requiring preauthorization under §413.014 or commissioner rules under that section or §413.011(g) shall be conducted by an independent review organization under Chapter 4202, Insurance Code, in the same manner as reviews of utilization review decisions by health maintenance organizations."

The Division agrees in part and disagrees in part with the comment that the Legislature intended to provide for a hearing conducted under the Administrative Procedure Act, and declines to make a change in regard to this statement. It is correct that hearings that proceed to SOAH will be conducted under the Administrative Procedure Act, because Labor Code §413.031(k) says that a hearing conducted by SOAH "shall be conducted in the manner provided for a contested case under Chapter 2001, Government Code." However, pursuant to Labor Code §410.153 (relating to Application of Administrative Procedure Act), "Chapter 2001, Government Code, applies to a contested case hearing to the extent that the commissioner finds appropriate . . . ," and pursuant to 28 TAC §142.1 (relating to Application of Administrative Procedure Act), only "§2001.201, relating to enforcement of subpoenas" applies to contested case hearings under Labor Code Chapter 410.

§133.308(a):

Comment: A commenter says that §133.308(a)(1)(A) makes the section applicable to disputes filed prior to September 1, 2007. However, the commenter says, disputes filed prior to September 1, 2007, must be handled under the statute and rule in effect at the time the dispute was filed, and an agency cannot make its rule or processes retroactive to a time when another statutory

provision existed. As such, the commenter recommends deleting subparagraph (A), and renumbering the provision appropriately.

A second commenter also recommends deletion of the last sentence of §133.308(a)(1)(A). The commenter says this change is to: "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process among other reasons."

Agency Response: The Division agrees in part and disagrees in part. A primary purpose of these rules is to implement HB 724, which provides a process for the appeal of administrative disputes arising under Labor Code §413.031. The Labor Code provision that had provided the process for appealing administrative decisions (Labor Code §413.031(k) as revised by HB 7, 79th Regular Legislative Session) was found to be unconstitutional, so prior to HB 724, there was no statutory provision in place to provide a process for appealing administrative decisions under Labor Code §413.031. To resolve the lack of statutory provisions, the enacting clause in Section 9 of HB 724 makes the bill applicable to "workers' compensation medical disputes described by Section 413.031, Labor Code, as amended by this Act and Section 413.0311, Labor Code, as added by this Act . . . that are pending for adjudication by the division of workers' compensation of the Texas Department of Insurance on or after the effective date of this Act [September 1, 2007] . . . ."

In regard to the appeal of a dispute described by Labor Code §413.031 or §413.0311, the Division disagrees that it is attempting to make these processes retroactive to a time when another statutory provision existed, because there was not a valid statutory provision in place prior to HB 724, only the unconstitutional statutory provision found in Labor Code §413.031(k) as it existed prior to HB 724. In regard to the appeal of a dispute described by Labor Code §413.031 or §413.0311, the Division is using the specific terms of applicability listed in Section 9 of HB 724.

However, not all the amendments in §133.307 and §133.308 are based on HB 724, so the effective dates in Section 9 of HB 724 would not be applicable to them. For this reason, the Division agrees in part with the commenter and disagrees in part with the commenter. In response to the comment the Division has changed the applicability provisions in §133.307(a) and §133.308(a) to specify that §133.307 and §133.308 are applicable to disputes filed May 25, 2008; however, the Division has also adopted language §133.307(a) and §133.308(a) that keeps the proposed dates of applicability in regard to §133.307(f) and §133.308(t)(1), the subsection in §133.307 and the paragraph in §133.308(t) that implement HB 724. Because these provisions implement HB 724 in order to cover the statutory gap addressed by HB 724, these provisions adopt the specific terms of applicability listed in Section 9 of HB 724.

§133.308(a)(3):

Comment: In regard to §133.308(a)(3), a commenter recommends inserting the word "Department" between the words "related" and "rules" in the sentence "The Insurance Code, the Labor Code and related rules govern the independent review process."

A second commenter recommends a similar change, suggestion that the words "Texas Department of Insurance" between inserted between the words "related" and "rules." The second commenter says this change is to: "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process among other reasons."

Agency Response: The Division disagrees with the comments and declines to make the recommended change, because inserting the word "Department" would imply that Division rules are not applicable to IRO reviews conducted under the Labor Code. Such a change would be inaccurate, as Division rules (such as §133.305 and §133.308) play a part in governing the IRO process along with the Department's rules.

In regard to the second commenter's reason for making the change, the Division does not see how making the recommended change would limit the number of disputes, clarify who must file the medical dispute, or provide due process.

§133.308(c):

Comment: In regard to §133.308(e), a commenter recommends adding the term "medicine" after "practice".

Agency Response: The Division disagrees with the comment and declines to make the suggested change because it would be too limiting and would not be in compliance with HB 2004. To add "medicine" would mean that only physicians (doctors of medicine and osteopathy) could do independent reviews. The definition of "doctor" in the Labor Code includes more medical professions than just doctors of medicine and osteopathy.

§133.308(d):

Comment: Several commenters addressed §133.308, concerning professional specialty requirements. One commenter specifically recommends that this subsection be amended to provide additional clarification for the parties.

Four commenters suggest adding to the provision a requirement that a reviewer be qualified by "licensure in this state and the same, or similar." One of the commenters says that the basis for its recommendation is its belief that the Legislature intended to limit reviews of health care services to those health care providers with the same specialty, and as an alternative to its suggested language, the commenter suggests that the section should provide a definition of the phrase "hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving." The commenter says that as drafted, the provision merely parrots the language of the statute, and does not provide sufficient guidance on what specialty a doctor is required to hold in any given case. This commenter also recommends deleting the phrase "until further material recovery from or lasting improvement to the injury can no longer reasonably be anticipated." The commenter recommends this, because it believes that a phrase concerning maximum medical improvement is not necessary or related to professional specialty requirements. The commenter says that limiting the requirement of the reviewer to only review health care provided before maximum medical improvement is contrary to the statute.

Two commenters recommend that the provision require that the reviewer be able to "provide or prescribe" the service that is the subject of review. As a basis for this suggestion, one of the commenters asserts that a medical doctor would be an appropriate IRO reviewer, even if the medical doctor cannot provide the service, because the medical doctor could "prescribe" a service to be "provided" by a different doctor. The commenter says that any other interpretation of the statute would result in no doctor being able to serve as an IRO reviewer in workers' compensation.

In regard to the phrase "training and experience to provide all health care reasonably required," two commenters recommend

changing the word "all" to "the." These commenters also recommend deleting the phrase "until further material from or lasting improvement to the injury can no longer reasonably be anticipated." One commenter says that use of the word "all" is overly broad, and goes beyond the statute, and says that the phrase recommended for deletion is unnecessary. The other commenter also recommends putting the word "compensable" in front of the word "injury" and "condition," and says that its suggested changes would: "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process among other reasons."

One commenter asks that spinal surgeons be required to be board certified by the American Board of Spine Surgeons, and another commenter says that denials of payment or services that were requested or performed by an orthopedic surgeon should only be denied by a similarly qualified orthopedic surgeon.

Two commenters recommend an addition to follow the words "reasonably required by the nature of the injury." The commenters suggest that adding "including to both generally treat the condition and to provide expertise on the specific procedure and treatment being requested." The commenters say this would ensure that a physician reviewer is knowledgeable and trained in the specific procedure and treatment under consideration, and help provide clear direction so that the physician reviewer and IRO are confident that the review is assigned to a physician that has the experience and training to make sound determination in a case under review. These commenters also suggest adding the sentence "Nothing in this subsection shall be construed to limit the clear statutory obligation to continually provide care that is necessary to cure or relieve the condition" to the end of the provision. The commenters say that this would be an important reference back to governing statute which will help to eliminate any potential disagreements and litigation related to otherwise what "material recovery from or lasting improvement" might be interpreted to mean, and would better ensure that an injured worker receives necessary care by having an appropriate initial review rather than delaying care if an appeal is necessary.

These two commenters also ask the following questions:

1. How will DWC ensure prospectively that doctors do have the appropriate education, training and experience, both in terms of generally treating the condition, as well as providing and reviewing the treatment in question?

2. What process will be used to review cases retrospectively to ensure appropriate compliance?

3. What enforcement action will be taken against carriers, URAs, and IROs that do not comply with the law? Should specific administrative penalties be imposed for violations and should the rule include harsher penalties for violators that show a "pattern of practice" of noncompliance?

4. What type of complaint or dispute process will be available to providers who want to challenge the appropriateness of the doctor reviewing a case?

Agency Response: The Division agrees in part with the commenters, and disagrees in part. Due to the number of comments, it is apparent that the subsection needs to be revised to provide additional clarification of the requirements.

In regard to the comments concerning adding to the provision a requirement that a reviewer be qualified by "licensure in this state and the same, or similar," the Division disagrees and declines to make the suggested change because it is not necessary. The Division notes that §133.308(c) specifically addresses professional licensing requirements; therefore it would be redundant to address them a second time in subsection (d).

In regard to the comment that the phrase "until further material recovery from or lasting improvement to the injury can no longer reasonably be anticipated" would limit a reviewer to reviewing only care provided before maximum medical improvement and should be removed, the Division disagrees and declines to make a change. The Division notes that this phrase is not the complete definition of maximum medical improvement, thus does not create a limitation based on maximum medical improvement. The intent of the Division is to ensure that a reviewer can completely provide the service being reviewed, and the Division believes that use of this phrase captures that intent.

In regard to inserting the words "or prescribe," the Division disagrees and declines to make this change because it would not be in line with the way the Division interprets the statute. The purpose of requiring professional specialty requirements is to ensure that the reviewer has the qualifications to understand and fully review the medical service that is the subject of review. However, allowing doctors that could only "prescribe" the service would not necessarily accomplish this.

In regard to the recommendation to change the word "all" to "the," the Division agrees to make this change. It is not necessary that a reviewer have the qualifications to provide all the care that might be required by an injury; the reviewer only needs to have qualifications related to the specific service being reviewed.

In regard to the suggestion to add the word "compensable" in two places, the Division disagrees and declines to make a change. Section 133.308 concerns medical necessity, and issues of compensability have no relation to it. A particular service may or may not be compensable, but that would have no effect on whether the service is medically necessary. Additionally, the Division does not see how this change would limit the number of disputes, clarify who must file a medical dispute, or provide due process.

In regard to the comments asking that specific medical specialties of spinal surgery and orthopedic surgery be addressed, the Division disagrees and declines to make a change, because doctors that practice these specialties must meet the same requirements as doctors in other medical specialties, and it is unnecessary to attempt to list every potential medical specialty in this rule. There are numerous fields of medicine that may be relevant to an injured employee, and it would be difficult to address each one on an individual basis in this section. If the Division attempted to make such a list, but left a field off, there would be questions as to the applicability of professional specialty requirements for that field. However, because HB 2004, in Labor Code §408.0044 and §408.0045, does make distinctions regarding dentists and chiropractors, the Division believes it is necessary to make a distinction in §133.308(d) regarding these practice areas. For this reason, the Division has inserted the sentence "A dentist meeting the requirements of subsection (c) of this section may perform a review of a dental service under this section, and a chiropractor meeting the requirements of subsection (c) of this section may perform a review of a chiropractic service under this section," into §133.308(d).

In regard to the suggestions to add the phrase "including to both generally treat the condition and to provide expertise on the specific procedure and treatment being requested," the Division disagrees and declines to make a change, because the suggested change is unnecessary. The Division believes that the subsec-

tion as adopted is sufficient to address professional specialty requirements.

In regard to the suggestion to add the sentence "Nothing in this subsection shall be construed to limit the clear statutory obligation to continually provide care that is necessary to cure or relieve the condition" to the end of the provision, the Division agrees that addition of such a statement can help capture the intent of the law, and has added similar wording to the subsection.

In regard to the questions, the Division provides these responses:

1. The qualification of IRO review doctors are submitted as a part of the IRO certification process under Insurance Code §4202.002 and Department rules in 28 TAC Chapter 12. In addition, the IRO should select the appropriate reviewer.

2. If a party believes that the IRO did not select the appropriate provider, he or she may file a complaint with TDI.

3. The enforcement actions taken against a party that does not comply with the law depend on the specific facts of a case and the status of the party - administrative penalties, injunctive actions, certification suspensions, or other processes might be appropriate.

4. A party can challenge the appropriateness of a doctor reviewing a case by filing a complaint with DWC or the Health and Workers' Compensation Networks Division.

§133.308(e):

Comment: In regard to §133.308(e) a commenter recommends requiring the IRO to send a certified statement that the reviewing physician is licensed to practice medicine in Texas.

Agency Response: The Division disagrees with the comment and declines to make the suggested changes because the IRO is already required to include this information by utilizing the IRO decision template. Additionally, the inclusion of "practice of medicine" is too restrictive, as it would only allow for doctors of medicine and osteopathy to perform reviews.

§133.308(g)(2)(A):

Comment: A commenter recommends that §133.308(g) be modified by placing the words "health care" in front of the word "providers" and placing the word "only" behind it. The commenter says this change is to: "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process among other reasons."

Agency Response: The Division disagrees with the comment, and declines to make a change. It is unnecessary to insert the words "health care" in front of providers, due to a text change made in response to a comment regarding §133.308(g)(1). It would not be accurate to insert the word "only" as recommended, because health care providers are not the only parties who may make a request for non-network preauthorization, concurrent, or retrospective medical necessity dispute resolution. Qualified pharmacy processing agents acting on behalf of a pharmacy, as described in Labor Code §413.0111, are also permitted to make such requests. Additionally, the Division does not agree that making the recommended change would limit the number of disputes or provide due process.

§133.308(g)(1):

Comment: In regard to §133.308(g)(1), a commenter expressed concern that that the party identification for network claims may be too broad. The commenter says that subparagraph (B) in this paragraph would allow injured employees to be a party to retrospective medical necessity disputes. The commenter recommends two changes: In subparagraph (A), the commenter recommends adding the words "health care" in front of the word "providers." In subparagraph (B) the commenter recommends adding the words "for health care that the injured employee has paid for" to the end of the sentence.

Agency Response: The Division agrees in part and disagrees in part with the comment. The term "provider" is generally understood to mean "health care provider;" however, the Division has made a change in the adopted rule to clarify that "provider" is a shortened form of "health care" provider. This change is in line with text in §133.307(b)(1). The Division declines to insert the words "health care" everywhere "provider" appears, because the change made makes that unnecessary.

The Division disagrees with the comment and declines to make the suggested change to limit "employees for preauthorization, concurrent, and retrospective medical necessity dispute resolution for health care that the injured employee has paid for." The injured employee is a claimant and has the right to request preauthorization, concurrent, and retrospective review, regardless of whether the health care has been paid for. To make this change would eliminate these employee rights.

§133.308(g)(2):

Comment: In regard to §133.308(g)(1), a commenter recommends adding the words "health care" in front of the word "providers" for purposes of clarity.

Agency Response: The Division agrees with the comment. However, the Division declines to make the suggested change because the change is unnecessary based on a change made to §133.308(g)(1).

§133.308(i):

Comment: In regard to §133.308(i), a commenter suggests that the subsection be reworded to require a requestor to file a request for independent review with the carrier or its designated URA. The commenter says that this suggestion is based on the fact that a utilization review decision may be rendered when a carrier is in the process of transitioning from one URA to another; as preparation for an independent review takes a considerable amount of time and effort, the previous URA may have little incentive to do more than the minimum, and it would be in the carrier's interest to have the current agent respond.

Agency Response: The Division disagrees with the suggestion. The Labor Code and the Insurance Code set a short time frame for initiation of a an IRO review, so it is important that the entity that actually issued an adverse decision receive notice of a request for independent review so that it may prepare and promptly send required documentation to the assigned IRO. Additionally, if a carrier changes its URA after the URA has issued an adverse decision, the party impacted may not be aware of the change or have contact information for the new URA - a requirement that the request for independent review be sent to a different URA could effectively result in the party missing appeal deadlines.

The Division notes that if a URA fails to perform functions required by the Labor Code and the Insurance Code, including functions related to appeal for an adverse decision, such failure could form the basis for an enforcement action.

Comment: A commenter says that requiring notification to the Department of a request for IRO review on the same day that the request is received by the carrier or its URA is unreasonable, arbitrary, and unduly burdensome. The commenter says that there will be days when a request is received late in the day, and that the proposed requirements creates potential for an unfortunate game of "gotcha." The commenter requests that the time frame be expanded to three days to notify the Department of a request for IRO review.

Agency Response: The Division disagrees with the comment and declines to make the recommended change because allowing a carrier or URA three days to submit a request for IRO review would not allow the Department sufficient time to assign an IRO and notify parties of the assignment. The requirement is not unreasonable or arbitrary, because Insurance Code anticipates the IRO receiving documents from the carrier and beginning its review at the three-day point. For a carrier to be able to submit documents to a carrier by the third day after an IRO review request, the Department must have received notice of the request for IRO review, assigned the IRO, and notified the parties of the assignment of IRO before the third day. To meet the statutory requirements, the Department needs notice of the IRO request on the day the carrier or URA receives it. The Division notes that this requirement is not unduly burdensome, and actually provides a carrier or URA more time to notify the Department than was allowed in the rule in effect at the time of proposal, which required notice of an IRO review request to the Department "immediately."

Comment: Commenters address the time frame to notify the Division of a request for IRO. Three commenters say that the proposal includes an unreasonably restrictive time frame for insurers to notify the DWC of and request an independent review. The commenters say that requiring notification to the Department of a request on the same day as receipt of a request for an IRO review is unrealistically short and would place an unreasonable burden on insurers. One commenter alleges that the Department never turns anything around in one day, and the other commenter asserts that no other stakeholder, nor the Department, faces such a stringent requirement. The commenters recommend that the words "on the same day" be changed to "within three working days from the date."

A third commenter notes that IRO requests may be sent to a URA, and because the URA does not know what to do with the request, the request just sits for a day or two, then is forwarded to the carrier. For this reason, the commenter suggests that the section allow a carrier three days to notify the Department of an IRO request, and expand that time to five days when the request is received by a URA. In addition, the commenter recommends rewording the first sentence in the subsection to say: "A requestor shall file a request for independent review with the insurance carrier (carrier) on the claim or the carrier on the claim's utilization review agent (URA) that actually issued the adverse determination no later than the 45th calendar day after receipt of the denial of reconsideration." According to the commenter, these changes would "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process."

One of the commenters also asserts that changing "immediately" to "on the same day" is a reduction in time, because it has been told that "immediately" means "one business day." The commenter says that a request for IRO review can sometimes be forwarded to the Department in one day, but that it routinely cannot. The commenter recommends allowing two to three days for a carrier to notify the Department of an IRO request, because it typically takes a day to a day and a half to do so. The commenter says that problems are not simply with forwarding information to the Department, but in how the carrier receives the request for IRO. The commenter notes that the request form could be forwarded to the carrier in different ways, and that it requires a minimum of four people to deal with the form, and the commenter says that 100 percent of the request forms it received in the past year had missing, incorrect, or misleading information. Additionally, the commenter says that as designed, the request form does not collect all the information a carrier needs when notifying the Department of an IRO request, so the carrier has to obtain that information. The commenter says that it is unreasonable to get it done on the same day a request is received, and that the way the section is written sets up every utilization review agent and carrier for failure.

Agency Response: The Division disagrees with the comments and declines to make the recommended change because allowing a carrier or URA three or five days to submit a request for IRO review would not allow the Department sufficient time to assign an IRO and notify parties of the assignment in a way that is consistent with the requirements of the Insurance Code. The Insurance Code anticipates the IRO receiving documents from the carrier and beginning its review at the three-day point, so prior to that time the Department must receive notice of the request for IRO review, assign the IRO, and notify the parties of the assignment of IRO. To meet the statutory requirements, the Department needs prompt notice of the IRO request when the carrier or URA receives it. The Division notes that the current time frame requires a carrier to "immediately" notify the Department of a request for IRO review, and that the proposal expanded this "immediate" time frame.

The Division notes that the Department does generally complete an IRO assignment within one day. Delayed IRO assignments are typically the result of a party's failure to submit the required information to the Department.

The Division also notes that allowing a carrier five days to notify the Department of a request for IROs would make it impossible for the carrier to comply with the Insurance Code's requirement that the carrier send documentation to the IRO the third day after the request for IRO review. Section 133.308 requires a party to send an IRO request to the URA that issues an adverse determination, and carriers should ensure that URAs know what to do when a request is received. The Division does not see how making the third commenter's recommended changes would limit the number of disputes, clarify who must file the medical dispute, or provide due process; and declines to make the changes.

In regard to the commenter's concerns about the IRO review request form, the Department will review the form to ensure that it captures all the necessary information.

Comment: A commenter recommends that language be added to §133.308(i) to correct an issue of carriers or URAs not forwarding IRO requests to the Department because they do not believe the requests to be timely. The commenter states that the issue of timeliness should be decided by the Department, and not by a party to the dispute. The commenter recommends the words "regardless of whether the carrier or URA believes the request to be timely" be added to the end of the sentence that says "The carrier shall notify the Department of a request for an independent review on the same day the request is received by the carrier or its URA."

Agency Response: The Division disagrees with the comment and declines to make the suggested change because it is unnecessary. The rule as proposed is sufficient to establish the requirement that carriers file all timely requests for IRO review. Failure to make a timely referral of an IRO request is an enforcement issue and a party that believes a valid request for IRO review was not forwarded to the Department should file a complaint with the Department.

Comment: In regard to §133.308(i), a commenter notes that many requests for independent review are incomplete, and requests that the provision be changed to require that a request for IRO review be filed "within one business day and upon receipt of a complete request."

Agency Response: The Division agrees in part, and disagrees in part. The Insurance Code anticipates the IRO receiving documents from the carrier and beginning its review at the three-day point, so prior to that time the Department must receive notice of the request for IRO review, assign the IRO, and notify the parties of the assignment of IRO. To meet the statutory requirements, the Department needs prompt notice of the request for IRO review when the carrier or URA receives it. Allowing a carrier one business day to notify the Department of a request for IRO review will permit the Department time to assign an IRO and notify the parties of the assignments, so the Division agrees to make a text change. However, rather than using the term "business day," the Division uses the term "working day," as this is a term defined in 28 TAC §102.3 to be used in the calculation of time.

The Division declines to add the words "and upon receipt of a complete request" to the provision, as this would give a carrier the ability to determine whether a request for IRO should be filed. Parties are expected to provide complete information to carriers when an IRO is requested. However, carriers should act to file IRO requests with the information that is available. If a carrier is not able to file an IRO request, the Department should be notified.

§133.308(j)(5) and (6):

Comment: In regard to §133.308(j)(5) and §133.308(j)(6), a commenter makes recommendations for purposes of clarity concerning authority to dismiss IRO requests. The commenter suggests adding the words "the department determines" before the words "the request" in each paragraph.

Agency Response: The Division disagrees with the comment and declines to make the suggested change, because it is unnecessary. The language in subsection (j) is sufficiently clear to indicate that authority to dismiss a request for IRO review rests with the Department.

§133.308(l):

Comment: A commenter strongly recommends a process whereby the carrier submits to an injured employee a list containing a detailed description of the medical records that the carrier submitted to the IRO for review. The commenter says that by providing injured employees with a detailed listing of information being filed with an IRO, carriers would be less likely to incur copy costs from health care providers when the injured employee requests medical records for a contested case hearing (CCH) on medical issues.

The commenter also strongly recommends allowing an injured employee or health care provider to supplement the carrier's submission, and the commenter suggests that an injured employee be notified and allowed to supplement when the Department notifies parties of an IRO assignment. The commenter says that such a notice should give the injured employees a set time frame to supplement the information for IRO review. The commenter suggests that for the IRO review to be a meaningful administrative review; both parties, and not just the carrier, must be able to submit information to the IRO for a decision, because the carrier and injured employee are adverse parties. The commenter says that information the carrier believes is relevant to the dispute is often different than the information the injured employee believes is relevant to the dispute, so the injured employees should be given the opportunity to supplement the carrier's submission to ensure a meaningful administrative review by the IRO.

Agency Response: The Division disagrees with the comment, and declines to make the recommended changes for the following noted reasons. The injured employee is not always party to an MDR proceeding, so it would be inappropriate and possibly confusing for all injured employees to receive documents lists and deadline notices concerning IRO reviews. Additionally, most of the deadlines incorporated in this section are set by statute to ensure that necessary medical care is timely delivered - the Division cannot extend statutory deadlines to allow parties to argue over documents. Finally, the purpose of an IRO review is not to be a forum where parties can argue about the relevance or importance of documents or records. The purpose of the IRO review is to review the documents considered by the URA and render a decision based on those documents.

The Division notes that the current rule provisions do not prohibit parties (including an injured employee that is party to the dispute) from submitting documents to an IRO. However, the Division does not believe that creating a formal process with time frames for submission of rebuttal documents would be in compliance with statutory provisions, and the Department thinks that creation of such a process would delay the IRO review. If parties have arguments to present concerning the weight of evidence, the arguments should be presented in a contested case hearing.

Comment: In regard to §133.308(l), a commenter suggests that there are reasons that parties do not submit all documentation to an IRO. The commenter says that providers may not have sufficient professional staff, so they make the best effort to gather records they think support their case and present those to the IRO, and that some carriers are in a similar situation. The commenter says this results in evidence being left out.

The commenter further says that carriers make their best effort to submit records, but that there are some things they do not have. The commenter says that IROs would prefer to just get documents that are relevant to the dispute, and not a mountain of records which have nothing to do with the dispute. For this reason, there is a balancing act that needs to be made.

The commenter says that clerical staff makes the determination regarding what should go to an IRO, because of the economics of the situation, in that carriers and providers have many other duties to perform. The commenter says that they see the IRO process as an informal process where they shouldn't have to jump through a lot of hoops. The commenter says that some parties make their best effort to send what they think makes their case, only to find out later that they may have needed to do more.

Agency Response: The Division agrees that records or documents with no relation to a medical necessity dispute should not be sent to an IRO, but clarifies that it is important for an IRO to receive all the relevant material, including any records or docu-

mentation reviewed by a carrier or URA in making an adverse determination. An IRO should not only be receiving the documentation that supports a particular party's position.

To provide guidance to the clerical staff that is determining what should be sent to the IRO, the Division makes the following clarifying changes to the text in §133.308:

The words "or the URA" are added following the word "carrier in §133.308(l)(2) and (3), and the words "including any medical records used by the carrier or the URA in making the determinations to be reviewed by the IRO" are added to the end of §133.308(l)(2).

§133.308(l) and (m):

Comment: A commenter says that denials need to be based on current medical records, and that it is the responsibility of the reviewing physician to make sure that he has been provided with such information when he performs the review.

Agency Response: The Division agrees in part and disagrees in part. The Division declines to make a change. The Division agrees that reviews need to be based on current medical records, but does not believe that changes to the rule are necessary to accomplish this. Section 133.308(m) provides that an IRO shall request additional medical information from either party or other providers whose records are relevant to review, and provides that the parties or providers shall deliver those requested records to the IRO. The subsection also provides that failure to provide the requested documentation to the IRO may result in enforcement action as authorized by statutes and rules.

§133.308(o):

Comment: A commenter says that delay of care is a very critical element, and that time limits are part of standard of care. The commenter says that when there are times when there is a critical window in which to provide care, and that an injured employee cannot wait a few days, a week, or a month. The commenter says that the first interest should be to care for the injured worker, and after that one should worry about money the care should be provided first, and parties can fight about it later.

The commenter says that in most cases proceeding in this way would render a dispute obsolete. The commenter concluded by saying that no injured worker should be required to give up a part of their body or their function because of the bottom line of some insurance company.

Agency Response: The Division agrees that delay of care can be a critical issue in regard to an injured worker's improvement; however, the Division declines to make a change concerning the process of medical necessity review, because it does not have the statutory authority to make the changes requested by the commenter. Labor Code §413.014 requires that a provider seek preauthorization or concurrent review for specified medical services, and Labor Code §413.031(d) requires that reviews of medical necessity issues be conducted by an independent review organization under Chapter 4202 of the Insurance Code in the same manner as reviews of utilization review decisions by health maintenance organizations. The Division notes that Insurance Code and §133.308 do take the special requirements of life-threatening conditions into consideration. Pursuant to Insurance Code §4201.360, review of life-threatening situations proceeds directly to independent review, and pursuant to Insurance Code §4202.003, the IRO decision must be issued no later than the eighth day after the date the IRO receives the request that the determination be made. These provisions are incorporated into §133.308 at subsections (i) and (o)(1).

§133.308(p):

Comment: A commenter notes that §133.307(d)(2)(B) prohibits any new denial reasons or defenses from being raised once a requestor files a dispute, and suggests that a similar provision be included in §133.308(p). The commenter expresses belief that all parties should be required to assert issues for dispute early in the claim to achieve an earlier resolution of the dispute, and that failing to limit carrier issues after dispute resolution has been requested causes confusion in the dispute resolution process, unnecessarily requires additional use of state resources, and may provide a tactic to delay medical care to an injured employee.

Agency Response: The Division disagrees with the comment and declines to make the suggested changes, because it would not be in line with the dispute sequence as established in §133.305(b). Section 133.307(d)(2)(B) places limitations on issues that can be raised in an appeal of a fee dispute, because issues of medical necessity or compensability should already have been resolved prior to resolution of fee disputes. However, in regard to §133.308, it is possible that fee dispute issues may arise or exist even after medical necessity issues are resolved.

Comment: A commenter says that information concerning denials should be sent to all physicians involved, because it is not efficient to only send this notice to the treating doctor.

Agency Response: The Division disagrees with the comment and declines to make a change, because the rule already provides for sufficient notice of the IRO decision by requiring that it be sent to all parties and their representatives of record. The Division notes that an IRO may not have contact information for all doctors involved in an injured employee's care, and that not all doctors involved in an injured employee's care will have an interest in the outcome of an IRO review.

§133.308(p)(1):

Comment: A commenter suggests that the basis of a denial should specify the precise reason for the denial, and that penalties should be directed toward insurance companies and their designates when reference is only made globally to their internal criteria or to the official disability guidelines.

Agency Response: The Division disagrees and declines to make a change, because insurance companies do not control what is in an IRO decision. The Division notes that an IRO decision is required to include an analysis of and an explanation for a decision, including the findings and conclusions used to support the decision.

Comment: A commenter opines that there is no transparency between the carrier, the injured employee, and the doctors engaged to render opinions. The commenter says that lawyers write letters to doctors that are designed to discredit the injured employee and tell doctors they believe there is nothing wrong. Because of this, the commenter says that there should be no written communication submitted by a carrier to a provider unless it is also simultaneously submitted to the Division and the injured employee or the injured employee's representative. The commenter says that there should be complete transparency of all records and communications submitted to doctors.

Agency Response: The Division disagrees with this comment and declines to make a change, because it would be unfeasible to require a carrier to copy the Division and the injured

employee on every communication made to a doctor. In most instances carriers exchange communications with doctors as a regular course of business, and the exchanges have no bearing on disputes. There is no reason for such documents to be simultaneously submitted to the Division and the injured employee, and submission of such documents would greatly increase expenses to carriers and to the Division, but provide no benefit to the injured employee.

The Division notes that Department procedures related to IRO reviews include notification to the claimant when an IRO review is requested. The notice includes: the date of the IRO assignment, name and contact information for the IRO, the name of the referring carrier, a contact number for the Department, and a description of the type of information that the carrier or utilization provider is required to submit to the carrier. Using the contact information, a claimant can submit documents that the claimant feels are relevant to the IRO. Additionally, the IRO decision contains a list of all the medical records and other documents reviewed by the IRO in making the decision; therefore an injured employee is able to receive notice of what documents an IRO reviewer used to make its decision. Taken as a whole, the Department believes that this information provides transparency into the documentation used by an IRO reviewing doctor to reach a decision.

§133.308(p)(1)(D):

Comment: In regard to §133.308(p)(1)(D), a commenter recommends requiring the IRO decision to include an affirmative statement that the reviewing physician holds a license to practice medicine in Texas.

Agency Response: The Division disagrees with the comment and declines to make the suggested change, because it is unnecessary. An IRO is already required to include information concerning reviewer licensure as a part of the IRO decision template, so it is unnecessary to duplicate the requirement in §133.308(p)(1)(D).

§133.308(p)(1)(G)(ii):

Comment: A commenter recommends requiring an IRO reviewer to affirmatively state the name of the treatment guideline within a network, because each network may have a different treatment guideline than the one adopted by the Division. The commenter says that this would provide an injured employee with necessary information should one choose to appeal the IRO decision.

Agency Response: The Division disagrees with the comment and declines to make a change, because the suggested change would constitute a substantive change from the proposed rule. The recommended change would place more stringent requirements on IRO reviewers when they prepare an IRO decision. Because the rule proposal included no changes to the requirements of an IRO decision, interested parties were not put on notice that changes might be made to the requirements in the adoption of the rules and were not afforded an opportunity to comment on such changes.

§133.308(r):

Comment: In regard to §133.308(r), a commenter suggest adding a requirement that an IRO also forward a copy of its invoice to an agent acting on behalf of a carrier, because self-insured entities using third party administrators might not be familiar with IROs or deadlines for payments.

Agency Response: The Division disagrees with the comment and declines to make the suggested change because: (1) the carrier does not necessarily provide its agent's contact information to the IRO; (2) the suggested change would unnecessarily increase the costs to the IRO; (3) the carrier is in a better position to forward the information to its agent; and (4) the carrier is the party ultimately responsible for the payment of the IRO fee.

§133.308(r)(6):

Comment: In regard to §133,308(r)(6), a commenter says that this section appears to require a carrier to pay an additional fee when the Department requires an IRO to include an amended notification of decision. The commenter asks that this point be clarified.

Agency Response: The Division clarifies that §133.308(r) requires a party to pay IRO fees in the same amount as required by Department rules (located at 28 TAC §12.403, relating to Fee Amounts). Section 133.308(r)(6) says that those required fees are to an amended notification, when one is required by the Department, thus a carrier would not be required to pay an additional fee. The Division notes that there were no proposed changes to §133.308(r)(6), and that its provisions are a part of the current IRO procedure under §133.308.

§133.308(s):

Comment: A commenter says that §133.308(s) makes retrospective IRO decisions enforceable pending appeal. The commenter says that this requires a carrier to prepare an explanation of benefits and make payment within 21 days, but that there is no statutory provision to support this. The commenter says that in support of this section, the Division has previously cited Labor Code §413.031(m), but that that section indicates that IRO decisions under §413.031(d) are binding pending appeal. The commenter asserts that §413.031(d) only refers to prospective IRO reviews, and dose not refer to retrospective reviews.

Agency Response: The Division clarifies that the Labor Code does not provide a process for how an IRO is to conduct retrospective review; therefore the Commissioner has the obligation of establishing the process through rule. So far as a retrospective review is related to medical services paid for by a claimant, the Commissioner has specific rulemaking authority to adopt §133.308(s) under §413.031(f). Additionally, the Commissioner has rulemaking authority to adopt a process for retrospective reviews under Labor Code §402.00111 and §402.061.

This provision is related to Labor Code §413.031(m) in that the Commissioner has adopted a process similar to the process for prospective and concurrent IRO reviews - during the pendency of an IRO dispute concerning a retrospective IRO review, the decision is binding and the parties should proceed in compliance with the decision.

§133.308(t):

Comment: A commenter says that when an IRO rules in favor of an injured worker, the decision needs to be protected because, while it is not intentional, injured workers do not have equal protection of the law in the system. The commenter says that its comments about IROs apply equally to other doctors and relates an incident involving a utilization review agent (URA) who claimed to be a specialist. Upon cross examination, it was shown that the majority of the URA's income came from reviews conducted between patient visits. The commenter asserts that no good doctor has time to render effective opinions between patient visits.

Agency Response: The Division agrees that an IRO decision needs to have relevance in later proceedings. However, the Division does not believe that it has authority to give an IRO decision more weight, depending on which party the decision favors. The Division clarifies that the adopted rules do not relate to specialization of URAs.

Comment: In regard to §133.308(t), a commenter asserts that the Division has no statutory authority to state that an IRO decision carries presumptive weight or that such presumptive weight must be overcome by a preponderance of evidence-based medical evidence to the contrary. The commenter expresses belief that an IRO decision should be treated like any other evidence that is submitted at a contested case hearing, and that once a party challenging the IRO decision presents evidence contrary to that decision, the hearing officer has to consider all the evidence and decide where the preponderance of evidence lies. The commenter says that it believes it may prove extremely difficult to find evidence-based medicine to establish that a particular injured employee is an outlier from the treatment guidelines, which are evidence-based. The commenter recommends the removal of the term "evidence-based" from this subsection because there is no statutory authority for its inclusion, and it establishes a standard of proof that is nearly impossible to meet.

A second commenter says that it does not support the assignment of presumptive weight to an IRO decision, because the Labor Code and Insurance Code do not assign presumptive weight to an IRO decision. The commenter says that the Commissioner does not have the statutory authority to assign presumptive weight to IRO decisions, and recommends that the sentence "An opinion issued by an IRO shall be given great weight that may be overcome by a preponderance of evidence-based medical evidence to the contrary" be used in lieu of the proposed sentence: "In a Contested Case Hearing (CCH), decision issued by an IRO carries presumptive weight that may only be overcome by a preponderance of evidence-based medical evidence to the contrary."

Agency Response: The Division disagrees with the comments concerning the relevance of an IRO decision; however, it agrees to make a change to the text to clarify the provision. There is clear evidence in the Labor Code that the Legislature intended an IRO decision to be more than just evidence in a contested case hearing. First, is the fact that the Legislature requires an IRO review if there is a question concerning medical necessity. The IRO process was added in 2002 as a way of ensuring that people who are medically trained are the ones making decisions about medical necessity, rather than having administrative staff make such decisions. In addition, because the Legislature felt that use of a medical opinion was so important, it chose to make the IRO decisions binding pending appeal. In 2005, the Legislature further showed its position that IRO reviews are important by removing the contested case process from medical necessity review, and requiring that appeals proceed directly to district court. Issues concerning due process and a party's ability to develop a record sufficient to proceed to appeal lead the Legislature to revise Labor Code 413.031 again in 2007 and reinsert the contested case hearing process. However, the Legislature still did not choose to downgrade the IRO process. Pursuant to Labor Code §413.0311, the purpose of a contested case hearing is for "an appeal of an independent review organization decision." The IRO decision is not a piece of evidence to be sued in an appeal under the Labor Code, the IRO decision is the subject of the appeal. For that reason, a party challenging an IRO decision is the one who must appeal and the one who must overcome the IRO decision.

The Division declines to degrade the value of the IRO decision, as this would be contrary to the value ascribed to an IRO decision by the Legislature and would be contrary to the Labor Code's requirement that the contested case hearing be an appeal of the IRO decision. However, in regard to the comments addressing the weight of an IRO decision, the Division agrees to make a text change to clarify a party's burden in regard to an IRO decision. The proposed version of §133.308(t) contained the sentence: "In a Contested Case Hearing (CCH), the decision issued by an IRO carries presumptive weight that may only be overcome by a preponderance of evidence-based medical evidence." This sentence has been changed to say: "In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence."

In regard to the first commenter's comment concerning a requirement for "evidence-based medical evidence" the Division disagrees with the comment and declines to make a change. In §413.011(e), the Labor Code requires treatment guidelines to be "evidence-based." Additionally, Labor Code §401.011(18-a) defines "Health care reasonably required" as being "health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with: (A) evidence-based medicine; or (B) if that evidence is not available, generally accepted standards of medical practice recognized in the medical community." (Emphasis added.) The purpose of the IRO is to determine if health care is medically necessary, and the IRO uses the Division's guidelines to make that determination. It is only reasonable that a party wanting to overcome the IRO decision use evidence that is based on the same standards used to develop the treatment guidelines used by the IRO and the same standards used to determine what is "Health care reasonably required."

Comment: A commenter says that while it does not object to the rule including language that indicates that neither TDI nor the DWC are parties to an appeal of an IRO decision, the rule provision that provides that a decision by an IRO is not an agency decision is problematic given the fact that TDI and the DWC may not delegate their statutory decision-making duties to a non-government entity or person. The commenter asserts that the authority to render decisions in all disputes that are presented to the Division for adjudication rests solely with the agency itself.

The commenter recommends that the word "decision" be changed to "opinion," and that the rule text be changed to say that the "opinion is considered to be an agency decision," but that "Not withstanding the fact that an IRO opinion is deemed to be a decision of the agency, neither the Department nor the Division are considered parties to an appeal."

Agency Response: The Division disagrees with the comment and declines to make a change. The Division notes that it is the Legislature that has given an IRO authority to make a decision regarding medical necessity. Prior to HB 2600, passed by the 77th Legislature, regular session, Texas Workers' Compensation Commission staff made determinations in both fee disputes and medical necessity disputes. However, amendments to Labor Code §413.031 divided these functions. Division staff still makes determinations in fee disputes, but IROs make decisions regarding medical necessity. Specifically, Labor Code §413.031 says, "In resolving disputes over the amount of payment due for services determined to be medically necessary and appropriate

for treatment of a compensable injury, the role of the division is to adjudicate the payment given the relevant statutory provisions and commissioner rules", but that "A review of the medical necessity of a health care service requiring preauthorization under Section 413.014 or commissioner rules under that section or Section 413.011(g) shall be conducted by an independent review organization. . . . "

The Division declines to change the word "decision" to "opinion," because "decision" is the term used in the Labor Code to describe the result of an IRO review." Labor Code §413.031 states "It is a defense for the insurance carrier if the carrier timely complies with the decision of the independent review organization." Labor Code §413.0311 references "an appeal of an independent review organization decision" in two places. Labor Code §413.032 concerns "Independent Review Organization Decision; Appeal", and contains a minimum list of elements that must be included in an IRO "decision." (emphasis added.)

Comment: A commenter suggests that a serious defect exists in the current law, because no peer review doctor or IRO reviewer is impartial or fair in any review. The commenter notes that an IRO decision may overturn multiple credible doctors, despite the reviewer having never examined the patient. The commenter says that it is insanity and it is dangerous to injured workers to ever give "presumptive weight" to any doctor who has not personally seen and examined the injured worker and conferred with the doctor requesting the care. Conversely, the commenter says that an IRO opinion should be protected when the reviewer rules in favor of the injured worker.

Agency Response: The Division disagrees with the comment; however the Division agrees to make a clarifying text change. Pursuant to Labor Code §413.0311(a)(2) and (3), it is the IRO decision that is being appealed. The Division interprets these provisions to mean that a party appealing an IRO decision has the burden of overcoming it. The purpose of the language in §133.308(t) is to specify that the party appealing an IRO decision has the burden of overcoming the decision, and the adopted language has been revised to state "the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence" in order to more directly express this.

§133.308(t)(1)(A):

Comment: A commenter recommends that §133.308(t)(1)(A) state the 20-day time frame to appeal an IRO decision, because injured employees will not always have access to 28 TAC §148.3. The commenter says that this change would properly informs injured employees of their ability to appeal a decision, and would reduce system participant confusion.

Agency Response: The Division disagrees with the comment and declines to make the suggested change, because the process for filing an appeal to SOAH, including the time frame to file an appeal, is already set in 28 TAC Chapter 148. An attempt to provide the same regulations in this rule would be redundant and could create the opportunity for arguments concerning conflicting rule provisions.

§133.308(t)(1)(B):

Comment: In regard to §133.308(t)(1)(B), a commenter recommends adding a provision that says "If at the time of the contested case hearing there are additional medical necessity disputes between the parties involving the same patient and same date of injury, then either party may file a motion to consolidate the additional medical necessity disputes into the medical necessity dispute set for contested case hearing. Failure of the parties to join additional medical necessity disputes involving the same patient and same date of injury that could have been made a part of the contested case hearing proceeding will result in a waiver by the party requesting MDR to pursue that disputed issue further." The commenter says that this change would make the medical dispute resolution system more efficient by avoiding multiple contested case hearings on the same claim, and would prevent a requestor from gaming the system by breaking down a large dollar medical dispute into several smaller disputes that would each require a hearing.

Agency Response: The Division disagrees with the comment and declines to make a change, because there is no statutory authority to require a party to consolidate all medical necessity disputes into one dispute, and because the recommended language would conflict with Labor Code §413.0311 and §413.031.

Labor Code §413.0311 addresses two types of appeals related to medical necessity: "an appeal of an independent review organization decision regarding determination of the retrospective medical necessity for a health care service for which the amount billed does not exceed $3,000;" and "an appeal of an independent review organization decision regarding determination of the concurrent or prospective medical necessity for a health care service." In each instance the section references "an appeal" of "[a] decision." However, with the recommended text, the appeal would be of multiple decisions, which would be in direct conflict with the statute.

Additionally, Labor Code §413.031(l) establishes a specific process for review of a medical dispute regarding spinal surgery. The provisions of Labor Code §413.031 would potentially be violated if disputes regarding spinal were required to be consolidated with all other medical necessity disputes involving the same patient and same date of injury.

Comment: A commenter references §133.308(t)(1)(B), and expresses belief that the Division should amend the provision to provide a more efficient dispute resolution process which would avoid multiple contested case hearings on the same claim and prevent requestors from gaming the system by breaking down large dollar medical disputes into several smaller disputes that would each require a hearing. To this end, the commenter suggests adding a new subparagraph that says, "If at the time of the contested case hearing there are additional medical fee disputes between the parties involving the same patient and same date of injury then either party may file a motion or the hearing officer may issue an order to consolidate the additional fee disputes into the medical fee dispute set for contested case hearing."

Agency Response: The Division disagrees with the comment and declines to make a change. The current dispute resolution process was devised by the Legislature and incorporated into Labor Code §§413.031, 413.0311, and 413.032, and the Division lacks authority to substitute that process with a different dispute resolution process.

The Division notes that the commenter's suggestion would require the consolidation of multiple disputes, even if they had not proceeded through all the steps of dispute resolution. For instance, when both a medical necessity issue and a fee dispute issue exist, the medical necessity issue must be resolved prior to review of the fee dispute issue. However, under the commenter's proposed change, if the medical necessity dispute is appealed to a contested case hearing, the fee dispute

would become consolidated with it, possibly without having proceeded through the reconsideration process outlined in 28 TAC §133.250 or the medical fee dispute resolution process outlined in §133.307.

§133.308(t)(1)(B)(i) and (ii):

Comment: In regard to §133.308(t)(1)(B)(i), a commenter recommends replacing the words "sent to" with "received." Additionally In regard to §133.308(t)(1)(B)(ii), the commenter recommends replacing the word "deliver" with "send."

The commenter says these changes are to: "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process among other reasons."

Agency Response: The Division disagrees in part and agrees in part. The Division declines to replace the words "sent to" with "received," because such a change would make it more difficult to affirmatively prove when the 20 day appeal period begins. An IRO is not part of the Division, so 28 TAC §102.5 (relating to General Rules for Written Communications to and from the Commission), which provides a means for determining the date a communication is received, is not applicable. Instead, 28 TAC §102.4 (relating to General Rules for Non-Commission Communications) is applicable. Section 102.4(h) provides a means for determining the date a communication is sent.

The Division does not see how making the recommended change would limit the number of disputes, clarify who must file a medical dispute, or provide due process. However, as used in this sentence, "send" would be a synonym to "deliver," and the Division agrees to make this change.

§133.308(t)(1)(B)(i) and (u)(1):

Comment: In regard to §133.308(t)(1)(B)(i) and §133.308(u)(1), a commenter says that these provisions conflict with the appeal procedures for appeal of retrospective medical necessity disputes to SOAH found in §133.308(t)(1)(A), appeals procedures for appeal of medical fee disputes to SOAH found in §133.307(f)(1)(A), and appeals procedures for appeal of medical fee disputes to medical CCH found in §133.307(f)(2)(A).

The commenter recommends that §133.308(t)(1)(B)(i) and §133.308(u)(1) be rewritten to state that a written appeal must be filed with the Division's Chief Clerk no later than 20 days after the date the decision is received.

Agency Response: The Division disagrees with the comment and declines to make a change. The Division notes that no conflict exists, because the sections cited by the commenter are applicable to different types of appeals, either appeals to SOAH or appeals of fee dispute decisions.

The Division notes that a difference exists between fee dispute resolution decisions and IRO decisions in that fee dispute resolution decisions are communications from the Division and IRO Decisions are communications from a non-division entity.

The Division's rule at 28 TAC §102.5 (relating to General Rules for Written Communications to and from the Commission) provides a means for determining the date a communication is received from the Division, so it is appropriate that a time frame concerning such a communication be calculated from the date the communication is received. However, §102.5 is not applicable to an IRO, because IROs are not part of the Division. Instead, 28 TAC §102.4 (relating to General Rules for Non-Commission Communications) is applicable to IROs. Section 102.4(h) provides a means for determining the date a communication is *sent*. Therefore, it is appropriate that a time frame based on a communication from a non-division entity be calculated from the date the communication is *sent*.

The time frame for appeals to SOAH is established by the Division's current rule in 28 TAC §148.3. The Division has not proposed any amendments to that section at this time.

§133.308(t)(1)(B)(i) and (vi):

Comment: A commenter says that an adequate period of time should be allowed for an appeal to be made, and recommends allowing 60 to 90 days for such a process.

Agency Response: The Division agrees in part and disagrees in part and declines to make a change. The Division agrees that parties should be allowed adequate time to appeal an IRO decision, but believes that 20 days is an adequate amount of time in which to file an appeal. The Division notes that this is the amount of time allowed by earlier versions of this rule, and that this was a sufficient amount of time in the past. The Division notes that the amount of time to file an appeal to District court is mandated by the Government Code, and the Division cannot expand that time through rule.

§133.308(t)(1)(B)(ii):

Comment: A commenter recommends that the MDR rules assert a time frame in which to exchange information, in order to insure that the exchange of information is made systematically and appeals are made in a timely fashion.

Agency Response: The Division agrees that information should be exchanged in a timely manner, but disagrees that a provisions needs to be added to the MDR rules to address this and declines to make a change because no change in necessary. As proposed, the rules already provide for time frames for the exchange of information. Specifically, proposed §133.307(f)(2)(E) and §133.308(t)(2)(B)(iii) say that Division contested case hearings shall be conducted in accordance with 28 TAC Chapters 140 and 142. Section 142.13(g) provides for the hearing officer to set a time frame for exchange of discovery when a hearing is held without a prior benefit review conference. In addition, the Division notes that parties may be granted additional time to conduct discovery pursuant to 28 TAC §142.13(f).

§133.308(t)(1)(B)(iv):

Comment: A commenter notes that proposed §133.308(t)(1)(B)(iv) provides that prior to the issuance of a CCH decision, a party may submit a request for a letter of clarification by the IRO to the DWC's chief clerk, but that the last sentence of the provision says that that a request for a letter of clarification may not ask the IRO to reconsider its decision or issue a new decision. The commenter suggests that this language could cause an IRO to believe that he or she may not review the underlying decision and reverse their decision if appropriate. The commenter says that the proposed language could result in unnecessary and inappropriate services being approved by the IRO process. The commenter recommends deleting the last sentence of the clause.

A second commenter also recommends deletion of the last sentence of §133.308(t)(1)(B)(iv), and additionally recommends deletion of §133.308(t)(1)(B)(iv)(IV). The commenter says these changes are to: "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process among other reasons."

Agency Response: The Division disagrees with the comments and declines to make the suggested change because a letter of clarification is not intended to be a request for a new review but to clarify the original decision due to ambiguity, lack of documentation provided by any party to the IRO for the review, and conflicts of information within the decision. The letter of clarification is not an alternative form of review in which the IRO conducts a new independent review, but rather an opportunity to assist in the next level of proceeding by allowing the Division to know if all information that should have been made available to the IRO was in fact made available for the review. In the event that all pertinent information was not made available by the concerned parties, enforcement action is available to the Division for failure to comply with the IRO request requirements.

The Division does not see how deletion of §133.308(t)(1)(B)(iv) or §133.308(t)(1)(B)(iv)(IV) would limit the number of disputes, clarify who must file the medical dispute, or provide due process, and thus declines to make the recommended change.

§133.308(t)(1)(B)(v):

Comment: A commenter disagrees with the proposed §133.308(t)(1)(B)(v), because the opposing party may provide inaccurate or incomplete medical information and the IRO may be making its decision based on this information. The commenter believes the rules should allow the presentation of additional documentary evidence if the claimant's medical condition so dictates. The commenter believes that DWC should consider the most recent medical evidence in making decisions.

The commenter opposes DWC adopting procedural rules that are different from SOAH, since it is confusing to stakeholders and encourages requestors to game the system to obtain the most favorable rules.

Agency Response: The Division has not adopted proposed §133.308(t)(1)(B)(v). The clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

The Division disagrees with the commenter and declines to make a change in regard to the comments concerning the Division adopting rules for its contested case hearings that differ from SOAH's rules. When the Legislature chose to establish a bifurcated system for appealing fee dispute and IRO decisions, it was aware that SOAH and the Division are regulated by different statutes and have different rules. However, the Legislature expressly stated that certain appeals are to be "conducted by a hearings officer in the manner provided for contested case hearings under [Labor Code] Subchapter D, Chapter 410," and the Division is not going to attempt to circumvent through rule the Legislature's intentions.

Comment: With regard to proposed §133.308(t)(1)(B)(v), a commenter expresses belief that the section unfairly eliminates the parties' due process rights by limiting the documentary evidence and witnesses to those disclosed early in the MDR process. The commenter contends that this conflicts with Labor Code section 401.021.

The commenter recommends that this section be eliminated and a new section proposed that ensures parties the right to a full evidentiary hearing.

The commenter thanks the Division for consideration of these issues.

Agency Response: The Division has not adopted proposed §133.308(t)(1)(B)(v), and the clauses in §133.308(t)(1)(B) have been renumbered as appropriate. The Division disagrees with the commenter with regard to Labor Code §401.021.

The commenter bases its recommendations on the provisions of Labor Code §401.021, stating that this section makes the APA applicable to contested case hearings, therefore the rules of evidence are applicable in contested case hearings. However, commenter disregards the limiting statement "Except as otherwise provided by this subtitle," which is in Labor Code §401.021. It is actually Labor Code §410.003 (relating to Application of Administrative Procedure Act) and §410.153 (also relating to Application of Administrative Procedure Act) that says how the APA applies to Division Contested Case hearings. These sections leave applicability of the APA to the Commissioner's discretion, and pursuant to the Commissioner's rule at 28 TAC §142.1 (relating to Application of the Administrative Procedure Act), only Government Code §2001.201 (relating to Enforcement of Subpoenas) is applicable to Division contested case hearings.

Comment: A commenter recommends removing the provisions which limit the documentary evidence and witnesses to those disclosed to the IRO, except upon a showing of good cause. The commenter believes that limiting the evidence in this way will keep employees from submitting evidence in addition to that submitted by the carrier. The commenter further believes that this limitation would raise due process issues and be contrary to *HCA Healthcare Corp v. Texas Dept. of Ins. and Division of Workers' Compensation,* (Cause No. D-1-GN-06-000176). Further, the commenter asserts this would be contrary to the intent of HB 724. The commenter believes that the focus should be on making the best decision, regarding medical necessity, with all of the relevant evidence, rather than whether the IRO's decision is supported by a preponderance of the evidence.

Agency Response: The Division has not adopted proposed §133.308(t)(1)(B)(v). The clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

Comment: A commenter is opposed to §133.308 which would limit the evidence in a CCH to the documentation that was filed during the medical dispute resolution process.

The commenter states that the stakeholders view the entire process of medical dispute resolution as a very informal process because there is no opportunity to present evidence in front of a Hearing Officer, perform discovery, or present witnesses. The commenter states HB 7 amended §413.031(k) of the Labor Code in an attempt to streamline the medical dispute process; however, a Travis County District Court Judge ruled the statute was facially unconstitutional because the provision did not provide the parties with opportunity for an administrative law hearing in which they could develop their record by presenting all their evidence, present witnesses, and conduct cross examination and discovery.

The commenter states that Representative Burt Solomons filed HB 724 to try to rectify this problem.

The commenter asserts that there can be no doubt that the parties should be able to present their full case at a contested case hearing, since the medical dispute process is not the type of process in which one can develop a record.

The commenter thinks the proposed sections would result in providers taking their entire medical record and throwing it at the IRO, dumping it into the mix for the medical fee dispute process - something that would add unnecessary paper flow in the system.

The commenter suggests that evidence should not be limited because new medical evidence could occur that may be relevant to the dispute that, if not allowed to be introduced, could result in health care being denied.

The commenter states the opposite is true as well, if evidence the carrier develops in the interim is not allowed to be introduced, health care may be delivered that could further injure an injured employee or end the injured employee's life. The commenter asserts that this often happened with spinal surgery cases in the 1990s.

The commenter states most medical bills (75 to 80 percent) are actually paid and only a small percentage go to dispute resolution. The commenter states even a smaller number would proceed to a contested case hearing. The commenter states that is why it is perplexed that the Division is even considering a provision to limit evidence when the commenter believes it would set up a situation very similar to the reality that was faced when HB 7 had §413.031(k) struck down as being facially unconstitutional because it deprived the parties of the right to have that hearing to develop their full record. The commenter asserts the proposed rule provisions would have the same effect.

The commenter requests that §133.308(t)(1)(B)(v) be revised to say: "At a Division contested case hearing under this paragraph, the parties shall be limited to documentary evidence exchanged and to witnesses reasonably disclosed in the manner provided by this subtitle. Parties may not raise issues regarding liability, compensability, or medical necessity at a contested case hearing for a medical fee dispute.

"(1) The parties to a Division contested case hearing shall exchange their documentary, other relevant evidence, and list of witnesses 14 days before the contested hearing.

"(2) A party who sends a document relating to a benefit contested case hearing to the Commission shall also deliver copies of the document to all other parties, or their representatives or attorneys. Delivery shall be accomplished by presenting in person, mailing by first class mail, facsimile or electronic transmission. The document sent to the Commission shall contain a statement certifying delivery. The following statement of certification shall be used: 'I hereby certify that I have on this _____ day of _____, _____, delivered a copy of the attached document(s) to (state the names of all parties to whom a copy was delivered) by (state the manner of delivery).'

"(3) The contested case hearing officer shall issue an order and direct the informal review organization to review any new medical evidence and issue an addendum report to the original IRO report. The party that was responsible for paying the initial IRO fee shall be ordered by the contested case hearing officer to pay an additional fee of $150.

"(4) The Division may take enforcement action against a party who is deemed to have a pattern of practice of withholding evidence and offering the withheld evidence at a contested case hearing."

Agency Response: The Division has not adopted proposed §133.308(t)(1)(B)(v). The clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

The Division declines to insert a provision outlining a time frame for exchange of evidence and witness lists in this section, as those provisions are addressed in 28 TAC Chapter 142 (relating to Dispute Resolution--Benefit Contested Case Hearing).

The Division declines to require the hearing officer to forward new documentation to the IRO for the purpose of preparing an indemnity report. The Division also declines to charge additional fees to reimburse IROs for their costs associated with the indemnity report. The hearing officer currently has the option to entertain requests from the parties for a letter of clarification from the IRO. To require the hearing officer to forward documents to the IRO would be to usurp the authority of the hearing officer as outlined in 28 TAC Chapter 142 (relating to Dispute Resolution--Benefit Contested Case Hearing).

Comment: A commenter recommends language revisions to the subclauses in proposed §133.308(t)(1)(B)(v) which states "documentary evidence exchanged and to witnesses reasonably disclosed during the medical fee dispute under this subchapter including the prehearing and hearing process except upon a showing of good cause. Good cause is shown if an ordinarily prudent person would not have exchanged the documentary evidence or listed the witness under the same or similar circumstances."

Agency Response: The Division has not adopted proposed §133.308(t)(1)(B)(v). The clauses in §133.308(t)(1)(B) have been renumbered as appropriate.

The Division declines to accept the commenter's definition of "good cause," as well as additional language for this section, since the Division has chosen to delete this section from the rule.

§133.308(t)(1)(B)(v):

Comment: A commenter says that the IRO reviewer should be available for cross-examination; should examine an injured employee, when necessary; and should not be anonymous, but rather should provide information concerning qualifications, amount of practice, and how much active practice is pursued in the filed of service being reviewed.

Agency Response: The Division disagrees with the comment and declines to make a change, because the recommended changes would not be consistent with provisions in the Insurance Code. Insurance Code §4202.009 provides that "information that reveals the identity of a physician or other individual health care provider who makes a review determination for an independent review organization is confidential," and the Division cannot adopt a rule provision that would violate this section.

§133.308(t)(1)(B)(vi):

Comment: In regard to proposed 133.308(t)(1)(B)(vi), a commenter recommends offering both the time frame and venue for appeal within the text of the section. The commenter says that providing the 30 day time frame and identifying venue in Travis County within the text of the rule would provide for a clear manner and would properly inform injured employees of their right to appeal.

Agency Response: The Division disagrees with the comment and declines to make a change, because such a change is not necessary and would not be in keeping with the way other Division rules address appeal under the Government Code; for instance, 28 TAC §148.15(f) provides that appeal of a SOAH contested case hearing that follows an IRO review is conducted "in accordance with the APA, §§2001.171, 2001.174, and 2001,176." The Division notes that access to the Government Code is available via the internet through the State of Texas website, and the Office of Injured Employee Counsel is available to provide assistance and guidance to injured employees who do not understand the processes under these sections.

Comment: In regard to proposed §133.308(t)(1)(B)(vi), a commenter recommends that the words "hearing officer" be deleted. The commenter bases his suggestion on the fact that a division hearing officer is employed by the Division, thus making a decision issued by a hearing officer a decision of the Division.

Agency Response: The Division agrees that a Division hearing officer is a Division employee, and thus a decision made by a Division hearing officer is a decision of the Division. However, the Division disagrees with the suggestion and declines to make the recommended change. While the decision may be a Division decision, the hearing officer is the person who actually examines evidence and makes a decision on behalf of the Division, and the hearing officer is the person who actually issues decisions on behalf of the Division. The specific point when the hearing officer actually issues the decision has been selected as the point when a decision becomes final and appealable, but use of the amorphous phrase "when issued by the Division" would not convey this intent.

Comment: A commenter recommends that §133.308(t)(1)(B)(vi) be redrafted to say: "A party to a medical necessity dispute who has exhausted all administrative remedies may seek judicial review of the Division's decision. Judicial review under this paragraph shall be conducted in the manner provided for judicial review of contested cases under Chapter 2001, Subchapter G Government Code. A decision becomes final and appealable when issued by the Division and received by the party. If a party to a medical necessity dispute files a petition for judicial review of the Division's decision, the party shall, at the time the petition is filed with the district court, send a copy of the petition for judicial review to the Division's Chief Clerk. The Division and the Department are not considered to be parties to the medical necessity dispute pursuant to Labor Code §413.031(k-2) and §413.0311(e)."

The commenter says this change would: "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process among other reasons."

Agency Response: The Division agrees in part and disagrees in part, and agrees to make some, but not all of the recommended changes.

The Division does not see how making the recommended change would limit the number of disputes, clarify who must file a medical dispute, or provide due process. However, the Division recognizes that most of the proposed change is identical to language concerning judicial appeal that was proposed in §133.307. The Division believes that use of similar language would assist parties in interpreting and applying both sections, and agrees to the suggested change so far as it is a reflection of language in §133.307.

However, the commenter also suggests that a decision should be determined to be final and appealable when "issued by the Division and received by the party," rather than when "issued by the hearing officer." The purpose of this provision is to establish the point when a decision becomes final and appealable, but use of the phrase "when issued by the Division and received by the party" would not convey this intent. Therefore the Division declines to make this change.

§133.308(t)(1)(B)(vii)(I):

Comment: A commenter says that §133.308(t)(1)(B)(vii)(I) sets out the information that must be included in a petition for judicial review. The commenter says that the petition for judicial review should include more specific information that will assist the Division and other parties with matching a petition for judicial review to the underlying claim and medical dispute resolution decision, and recommends deleting the list of items included in the proposed section, and replacing them with the following items in the following order: the medical dispute resolution tracking number(s) for the dispute being appealed; the carrier claim number; DWC claim number; the names of the parties; the petition cause number, if known; the identity of the court; and the date the petition was filed with the court.

A second commenter offers a similar suggestion, asking that the proposed list of items be replaced with the following items in the following order: the DWC MDR Tracking number(s) for the dispute being appealed; the names of the parties; the insurance carrier claim number; the petition cause number; the identity of the court; and the date the petition was filed with the court. The commenter says this change would: "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process among other reasons."

Agency Response: The Division disagrees with the comments and declines to make the recommended changes. The Division clarifies that the listed information is not necessarily required to be in a petition, but must be provided in a cover letter if not in the petition. The Division notes that it is the Rules Of Civil Procedure and local court rules that dictate what must be in a petition for judicial review.

The Division does not see how making the recommended change would limit the number of disputes, clarify who must file a medical dispute, or provide due process.

The purpose of this provision is simply to ensure that the Division has sufficient information concerning an appeal to be able to assemble the correct administrative record for use by the District Court. The recommended changes would not further this goal; for instance, the Division does not need a carrier's internal claim number. Additionally, if a party does not know the petition cause number for a case it has filed, it should contact the district clerk's office and get the number before forwarding a copy of the petition to the Division.

The Division's staff has determined that the list of information in §133.308(t)(1)(B)(vii)(I) as proposed is sufficient for the Division to be able to assemble an administrative record.

§133.308(t)(1)(B)(vii)(II):

Comment: In regard to §133.308(t)(1)(B)(vii)(II), a commenter recommends deleting the list of items included in the record of the hearing as was proposed, and suggests replacing it with the following items in the following order: each pleading, motion, and intermediate ruling; evidence received or considered; a statement of matters officially noticed; questions and offers of proof, objections, and rulings on them; proposed findings and exceptions; each decision, opinion, or report by the officer presiding at the hearing; and all staff memoranda or data submitted to or considered by the contested case hearing officer or members of the agency who are involved in making the decision.

The commenter says this change would: "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process among other reasons."

Agency Response: The Division disagrees and declines to make the recommended changes, because they are unnecessary, inappropriate, and would result in a denial of due process to parties seeking to appeal a Division hearing officer's decision. Addition-

ally, the Division does not see how making the recommended change would limit the number of disputes, clarify who must file a medical dispute, or provide due process.

In response to the commenters suggestion to replace the word "all" in the first item and the word "any" in the fifth item with the word "each," The Division notes that this change in wording would have no effect, and the Division declines to do it because it is unnecessary.

In response to the commenters suggestion to add an item for "proposed findings and exceptions," the Division notes the following factors: If proposed findings or exceptions are offered as a motion or pleading, they are already covered by the first item in the list. If proposed findings or exceptions are offered as an oral motion during the course of the hearing, they will be included in the transcript of the hearing. For this reason, it is unnecessary to include a separate item for proposed findings and exceptions, and the Division declines to make the suggested change.

In response to the commenters suggestion to add an item for "all staff memoranda or data submitted to or considered by the contested case hearing officer or members of the agency who are involved in making the decision," the Division notes that this language would be overly-inclusive - such items might include internal memoranda that are not relevant to the appeal or draft opinions that are not intended to be issued. It would be inappropriate to include such items in the agency record of a contested case hearing.

Finally, in response to the commenter's suggestion to delete the item "a transcription of the audio record of the Division CCH" from the list of items included in the agency record, the Division notes this: the purpose of having a contested case hearing is to allow parties to examine and cross-examine witnesses and offer legal arguments. If an appellate court is to be able to review testimony or know what arguments were presented to the hearing officer, a transcript of the hearing is essential. The commenter's suggestion to not include a transcript of the hearing in the agency record would prevent an appellate court from being able to review what occurred at the contested case hearing, and deny parties their due process rights.

§133.308(t)(1)(B)(vii)(III):

Comment: In regard to §133.308(t)(1)(B)(vii)(III), a commenter expresses support for the provision, but recommends adding the sentence "If DWC determines that a party is unable to pay such costs, DWC may waive the cost to produce the certified record in part or whole."

Agency Response: The Division appreciates the commenter's support, but disagrees with the recommendation and declines to make the change requested by the commenter, because no change is necessary. The Division has authority to waive the cost of the cost to produce the certified record in part or whole without a need to incorporate an express provision to that effect in this rule.

§133.308(t)(1)(C):

Comment: In regard to §133.308(t)(1)(C), a commenter recommends adding the words "as set forth in the State Fee Schedule 28 TAC §108.1" to the end of the sentence that says "The party requesting the record shall pay the IRO copying costs for the records." The commenter says this change is to: "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process among other reasons."

Agency Response: The Division disagrees with this comment and declines to make a change, because 28 TAC §108.1 (related to Charges for Copies of Public Information) is not related to a request made to an IRO pursuant to §133.308(t)(1)(C), because 28 TAC §108.1 concerns requests for information made to the Division pursuant to the Public Information Act. An IRO is a private entity, and not a part of the Division or the Department; therefore, a request made to the IRO is not a request made to the Department or the Division. Additionally, in some instances the information used by an IRO in making its decision would be specifically exempt from disclosure. However, if a party is appealing a decision of the IRO, the party is able to access the information pursuant to §133.308(t)(1)(C in order to pursue the appeal.

Finally, the Division does not see how making the recommended change will would limit the number of disputes, clarify who must file the medical dispute, or provide due process.

§133.308(t)(1)(C)(viii):

Comment: In regard to section §133.308(t)(1)(C)(viii), a commenter recommends adding a comma followed by the words "learned treatise" behind the words "any pertinent medical literature." The commenter says this change is to: "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process among other reasons."

Agency Response: The Division disagrees and declines to make a change, because no change is necessary. A "learned treatise" is a form of "medical literature" and, therefore, does not need to be listed separately from "medical literature." The Division does not see how making the recommended change would limit the number of disputes, clarify who must file the medical dispute, or provide due process.

§133.308(u)(2):

Comment: In regard to §133.308(u)(2), a commenter says that 20 days is not adequate notice to prepare for a hearing. The commenter says that, at times, it takes the Division 3 - 7 days to set a hearing and notify the parties. This means, asserts the commenter, that the time to prepare is dropped to two weeks or less. The commenter says that this makes it impossible for a carrier to identify and obtain an expert witness to testify and adequately prepare for a hearing. The commenter says that the time frame is arbitrary, without medical basis, and unrealistic.

The commenter points out that a spinal surgical event is invasive and impacts the rest of the injured worker's life, and says that it is important to note that by the time the dispute is appealed at CCH, three medical doctors will have determined that the procedure is not medically necessary. To support this statement regarding three doctors, the commenter lists the initial preauthorization denial, the reconsideration denial and the IRO denial.

The commenter recommends that the time frame be expanded to 60 days, asserting that this would ensure that both parties have time to prepare and stating that this would be consistent with 28 TAC §142.6(b) as it regards the time frame allowed for setting a CCH without a prior BRC.

Agency Response: The Division disagrees and declines to make a change, because §133.308(u)(2) was not a proposed provision, but rather was part of the current rule.

The purpose of this provision is to provide an expedited contested case hearing review process, as the issue involves the medical necessity of spinal surgery. Labor Code §410.025 gives

the Commissioner authority to prescribe the time within which a benefit review conference must be scheduled. Section 142.6(b), cited by the commenter, does not concern expedited hearing settings.

The Division disagrees that in all cases three doctors will have determined that the procedure is not medically necessary by the time it reaches the IRO. The injured employee would have determined that the procedure was medically necessary, the carrier's URA would have twice determine that the procedure was not medically necessary, and the IRO may have either upheld or overturned the URA's determination.

The Division notes that a party has 20 days in which to examine an IRO decision and determine whether an appeal is appropriate. Additionally, the Division notes that a party is not required to wait until the contested case hearing is set on the docket to begin preparing its case, but can begin preparing for an appeal the moment the IRO decision is received.

§133.308(w):

Comment: A commenter says that §133.308(w) is entirely unnecessary. The commenter questions the purpose of including the language in the proposal, and asserts that the inclusion of this language in a rule is a major departure from the Division's normal mode of operation. The commenter asks that the subsection be deleted.

A second commenter recommends deleting the words "Enforcement. If the Department believes that any person is in violation of the Labor Code, Insurance Code, or related rules, the Department may initiate an enforcement action." The commenter says that this change would: "(1) limit the number of disputes; (2) clarify who must file the medical dispute; and (3) provide due process among other reasons."

Agency Response: The Division disagrees with the comments and declines to make the suggested change because the agency has authority to pursue enforcement actions when the insurance Code, Labor Code, and agency rules are violated. Stating that the Department may initiate enforcement actions is not a divergence from Division or Department procedures, as this authority is often addressed in agency rules. In response to the question, the Division notes that the language was included in the proposal because the subsection had been renumbered, as indicated by the fact that "(w)" was underlined in the proposal. The Division notes that the language was not a proposed provision in the rule, but was a part of the current rule.

The Division does not see how making the recommended change would limit the number of disputes, clarify who must file the medical dispute, or provide due process.

For with Changes: Texas Medical Association; Pringle & Gallagher, L.L.P.; Sedgwick CMS; Zenith Insurance Company; Medtronic, Inc.; Gardere Wynne Sewell, LLP; American Insurance Association; Texas Pain Society; Property Casualty Insurers of America; Office of Injured Employee Counsel; Insurance Council of Texas; Texas Mutual Insurance; Texas Lobby Solutions, Inc.; Insurance Council of Texas; Flahive, Ogden & Latson; Texas Hospital Association; Two individuals.

Against: An individual; Stone, Loughlin & Swanson.

Neither for nor against: Four individuals.

The amendments are adopted pursuant to Labor Code §§408.0271, 413.002, 413.0111, 413.020, 413.031, 413.0311, 413.032, 408.0043, 408.0044, 408.0045, 401.024, 402.00111, 402.083 and 402.061; Insurance Code §4201.054 and Government Code §2001.177. Labor Code §408.0271 states that if health care services provided to an employee are determined by the carrier to be inappropriate, the carrier shall notify the provider in writing of the carrier's decision and demand a refund of the portion of payment on the claim received by the provider for the inappropriate services and the provider may appeal such a carrier's determination no later than the 45th day after the date of the carrier's request for the refund. Labor Code §413.002(d) provides that if the commissioner determines that an IRO is in violation of Labor Code Chapter 413, rules adopted by the commissioner under Chapter 413, applicable provisions of Labor Code Title 5, the commissioner or a delegated representative shall notify the IRO of the alleged violation and may compel the production of any documents or other information as necessary to determine whether the violation occurred. Labor Code §413.0111 provides that the rules adopted by the commissioner for the reimbursement of prescription medications and services must authorize pharmacies to use agents or assignees to process claims and act on behalf of the pharmacies under terms and conditions agreed upon by the pharmacies. Labor Code §413.020 provides the authority to adopt rules which enable the Division to charge a carrier a reasonable fee for access to or evaluation of health care treatment, fees, or charges. The section also provides that the Division may charge a provider who exceeds a fee or utilization guideline or a carrier who unreasonably disputes charges that are consistent with a fee or utilization guideline a reasonable fee for review of health care treatment, fees, or charges. Labor Code §413.031 specifies the processes for the decision and appeal for medical fee and medical necessity disputes not subject to Labor Code §413.0311, states that the commissioner by rule shall specify the appropriate dispute resolution process for fee disputes in which a claimant has paid for medical services and seeks reimbursement, and provides that an IRO that uses doctors to perform reviews of health care services provided under this title may only use doctors licensed to practice in this state. Labor Code §413.0311 specifies the processes for the decision and appeal for medical fee and medical necessity disputes which involve a party to a medical fee dispute in which the amount sought in reimbursement does not exceed $2,000, a party appealing an IRO decision regarding determination of the retrospective medical necessity for a health care service for which the amount billed does not exceed $3,000, and a party appealing an IRO decision regarding determination of the concurrent or prospective medical necessity for a health care service. Labor Code §413.032(a) provides that an IRO that conducts a review under Chapter 413 shall specify the minimum elements on which the IRO decision is based. Labor Code §408.0043 provides that a doctor, other than a chiropractor or a dentist, performing an independent review of a health care service provided to an injured employee, including a retrospective review, who reviews a specific workers' compensation case to hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving. Labor Code §408.0044 provides that a dentist performing an independent review of a dental service provided to an injured employee, including a retrospective review, who reviews a specific workers' compensation case must be licensed to practice dentistry. Labor Code §408.0045 provides that a chiropractor performing an independent review of a chiropractic service provided to an injured employee, including a retrospective review, who reviews a specific workers' compensation case must be licensed to engage in the practice of chiropractic. Labor Code §401.024

authorizes the commissioner to require by rule the use of facsimile or other electronic means to transmit information. Labor Code §402.00111 provides that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Labor Code §402.083 provides that information in or derived from a claim file regarding an employee is confidential. Labor Code §402.061 provides that the commissioner of workers' compensation has the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act. Insurance Code §4201.054 grants the commissioner of workers' compensation the authority to adopt rules as necessary to implement Chapter 4201, as that Article applies to utilization review of health care services provided to persons eligible for workers' compensation medical benefits under Labor Code Title 5. Government Code §2001.177(a) provides that a state agency by rule may require a party who appeals a final decision in a contested case to pay all or a part of the cost of preparation of the original or a certified copy of the record of the agency proceeding that is required to be sent to the reviewing court.

§133.305. MDR--General.

(a) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Adverse determination--A determination by a utilization review agent that the health care services furnished or proposed to be furnished to a patient are not medically necessary, as defined in Insurance Code §4201.002.

(2) Life-threatening--A disease or condition for which the likelihood of death is probable unless the course of the disease or condition is interrupted, as defined in Insurance Code §4201.002.

(3) Medical dispute resolution (MDR)--A process for resolution of one or more of the following disputes:

(A) a medical fee dispute; or

(B) a medical necessity dispute, which may be:

(i) a preauthorization or concurrent medical necessity dispute; or

(ii) a retrospective medical necessity dispute.

(4) Medical fee dispute--A dispute that involves an amount of payment for non-network health care rendered to an injured employee (employee) that has been determined to be medically necessary and appropriate for treatment of that employee's compensable injury. The dispute is resolved by the Division of Workers' Compensation (Division) pursuant to Division rules, including §133.307 of this subchapter (relating to MDR of Fee Disputes). The following types of disputes can be a medical fee dispute:

(A) a health care provider (provider), or a qualified pharmacy processing agent as described in Labor Code §413.0111, dispute of an insurance carrier (carrier) reduction or denial of a medical bill;

(B) an employee dispute of reduction or denial of a refund request for health care charges paid by the employee; and

(C) a provider dispute regarding the results of a Division or carrier audit or review which requires the provider to refund an amount for health care services previously paid by the carrier.

(5) Network health care--Health care delivered or arranged by a certified workers' compensation health care network, including authorized out-of-network care, as defined in Insurance Code Chapter 1305 and related rules.

(6) Non-network health care--Health care not delivered or arranged by a certified workers' compensation health care network as defined in Insurance Code Chapter 1305 and related rules. "Non-network health care" includes health care delivered pursuant to Labor Code §413.011(d-1) and §413.0115.

(7) Preauthorization or concurrent medical necessity dispute--A dispute that involves a review of adverse determination of network or non-network health care requiring preauthorization or concurrent review. The dispute is reviewed by an independent review organization (IRO) pursuant to the Insurance Code, the Labor Code and related rules, including §133.308 of this subchapter (relating to MDR by Independent Review Organizations).

(8) Requestor--The party that timely files a request for medical dispute resolution with the Division; the party seeking relief in medical dispute resolution.

(9) Respondent--The party against whom relief is sought.

(10) Retrospective medical necessity dispute--A dispute that involves a review of the medical necessity of health care already provided. The dispute is reviewed by an IRO pursuant to the Insurance Code, Labor Code and related rules, including §133.308 of this subchapter.

(b) Dispute Sequence. If a dispute regarding compensability, extent of injury, liability, or medical necessity exists for the same service for which there is a medical fee dispute, the disputes regarding compensability, extent of injury, liability, or medical necessity shall be resolved prior to the submission of a medical fee dispute for the same services in accordance with Labor Code §413.031 and §408.021.

(c) Division Administrative Fee. The Division may assess a fee, as published on the Division's website, in accordance with Labor Code §413.020 when resolving disputes pursuant to §133.307 and §133.308 of this subchapter if the decision indicates the following:

(1) the provider billed an amount in conflict with Division rules, including billing rules, fee guidelines or treatment guidelines;

(2) the carrier denied or reduced payment in conflict with Division rules, including reimbursement or audit rules, fee guidelines or treatment guidelines;

(3) the carrier has reduced the payment based on a contracted discount rate with the provider but has not made the contract available upon the Division's request;

(4) the carrier has reduced or denied payment based on a contract that indicates the direction or management of health care through a provider arrangement that has not been certified as a workers' compensation network, in accordance with Insurance Code Chapter 1305; or

(5) the carrier or provider did not comply with a provision of the Insurance Code, Labor Code or related rules.

(d) Confidentiality. Any documentation exchanged by the parties during MDR that contains information regarding a patient other than the employee for that claim must be redacted by the party submitting the documentation to remove any information that identifies that patient.

(e) Severability. If a court of competent jurisdiction holds that any provision of §§133.305, 133.307, and 133.308 of this subchapter are inconsistent with any statutes of this state, are unconstitutional, or

are invalid for any reason, the remaining provisions of these sections shall remain in full effect.

§133.307. MDR of Fee Disputes.

(a) Applicability. The applicability of this section is as follows.

(1) This section applies to a request for medical fee dispute resolution for non-network or certain authorized out-of-network health care not subject to a contract, that is remanded to the Division or filed on or after May 25, 2008. Except as provided in paragraph (2) of this subsection, dispute resolution requests filed prior to May 25, 2008, shall be resolved in accordance with the statutes and rules in effect at the time the request was filed.

(2) Subsection (f) of this section applies to a request for medical fee dispute resolution for non-network or certain authorized out-of-network health care not subject to a contract, that is:

(A) pending for adjudication by the Division on September 1, 2007;

(B) remanded to the Division on or after September 1, 2007; or

(C) filed on or after September 1, 2007.

(3) In resolving non-network disputes regarding the amount of payment due for health care determined to be medically necessary and appropriate for treatment of a compensable injury, the role of the Division of Workers' Compensation (Division) is to adjudicate the payment, given the relevant statutory provisions and Division rules.

(b) Requestors. The following parties may be requestors in medical fee disputes:

(1) the health care provider (provider), or a qualified pharmacy processing agent, as described in Labor Code §413.0111, in a dispute over the reimbursement of a medical bill(s);

(2) the provider in a dispute about the results of a Division or carrier audit or review which requires the provider to refund an amount for health care services previously paid by the insurance carrier;

(3) the injured employee (employee) in a dispute involving an employee's request for reimbursement from the carrier of medical expenses paid by the employee; or

(4) the employee when requesting a refund of the amount the employee paid to the provider in excess of a Division fee guideline.

(c) Requests. Requests for medical dispute resolution (MDR) shall be filed in the form and manner prescribed by the Division. Requestors shall file two legible copies of the request with the Division.

(1) Timeliness. A requestor shall timely file with the Division's MDR Section or waive the right to MDR. The Division shall deem a request to be filed on the date the MDR Section receives the request.

(A) A request for medical fee dispute resolution that does not involve issues identified in subparagraph (B) of this paragraph shall be filed no later than one year after the date(s) of service in dispute.

(B) A request may be filed later than one year after the date(s) of service if:

(i) a related compensability, extent of injury, or liability dispute under Labor Code Chapter 410 has been filed, the medical fee dispute shall be filed not later than 60 days after the date the requestor receives the final decision, inclusive of all appeals, on compensability, extent of injury, or liability;

(ii) a medical dispute regarding medical necessity has been filed, the medical fee dispute must be filed not later than 60 days after the date the requestor received the final decision on medical necessity, inclusive of all appeals, related to the health care in dispute and for which the carrier previously denied payment based on medical necessity; or

(iii) the dispute relates to a refund notice issued pursuant to a Division audit or review, the medical fee dispute must be filed not later than 60 days after the date of the receipt of a refund notice.

(2) Provider Request. The provider shall complete the required sections of the request in the form and manner prescribed by the Division. The provider shall file the request with the MDR Section by any mail service or personal delivery. The request shall include:

(A) a copy of all medical bill(s), in a paper billing format using an appropriate DWC approved paper billing format, as originally submitted to the carrier and a copy of all medical bill(s) submitted to the carrier for reconsideration in accordance with §133.250 of this chapter (relating to Reconsideration for Payment of Medical Bills);

(B) a copy of each explanation of benefits (EOB), in a paper explanation of benefits format, relevant to the fee dispute or, if no EOB was received, convincing documentation providing evidence of carrier receipt of the request for an EOB;

(C) the form DWC-60 table listing the specific disputed health care and charges in the form and manner prescribed by the Division;

(D) when applicable, a copy of the final decision regarding compensability, extent of injury, liability and/or medical necessity for the health care related to the dispute;

(E) a copy of all applicable medical records specific to the dates of service in dispute;

(F) a position statement of the disputed issue(s) that shall include:

(i) a description of the health care for which payment is in dispute,

(ii) the requestor's reasoning for why the disputed fees should be paid or refunded,

(iii) how the Labor Code, Division rules, and fee guidelines impact the disputed fee issues, and

(iv) how the submitted documentation supports the requestor position for each disputed fee issue;

(G) documentation that discusses, demonstrates, and justifies that the payment amount being sought is a fair and reasonable rate of reimbursement in accordance with §134.1 of this title (relating to Medical Reimbursement) when the dispute involves health care for which the Division has not established a maximum allowable reimbursement (MAR), as applicable; and

(H) if the requestor is a pharmacy processing agent, a signed and dated copy of an agreement between the processing agent and the pharmacy clearly demonstrating the dates of service covered by the contract and a clear assignment of the pharmacy's right to participate in the MDR process. The pharmacy processing agent may redact any proprietary information contained within the agreement.

(3) Employee Dispute Request. An employee who has paid for health care may request medical fee dispute resolution of a refund or

reimbursement request that has been denied. The employee's dispute request shall be sent to the MDR Section by mail service, personal delivery or facsimile and shall include:

(A) the form DWC-60 table listing the specific disputed health care in the form and manner prescribed by the Division;

(B) an explanation of the disputed amount that includes a description of the health care, why the disputed amount should be refunded or reimbursed, and how the submitted documentation supports the explanation for each disputed amount;

(C) Proof of employee payment (including copies of receipts, provider billing statements, or similar documents);

(D) a copy of the carrier's or health care provider's denial of reimbursement or refund relevant to the dispute, or, if no denial was received, convincing evidence of the employee's attempt to obtain reimbursement or refund from the carrier or health care provider;

(4) Division Response to Request. The Division will forward a copy of the request and the documentation submitted in accordance with paragraph (2) or (3) of this subsection to the respondent. The respondent shall be deemed to have received the request on the acknowledgment date as defined in §102.5 of this title (relating to General Rules for Written Communications to and from the Commission).

(d) Responses. Responses to a request for MDR shall be legible and submitted to the Division and to the requestor in the form and manner prescribed by the Division.

(1) Timeliness. The response will be deemed timely if received by the Division via mail service, personal delivery, or facsimile within 14 calendar days after the date the respondent received the copy of the requestor's dispute. If the Division does not receive the response information within 14 calendar days of the dispute notification, then the Division may base its decision on the available information.

(2) Carrier Response. Upon receipt of the request, the carrier shall complete the required sections of the request form and provide any missing information not provided by the requestor and known to the carrier.

(A) The response to the request shall include the completed request form and:

(i) all initial and reconsideration EOBs, in a paper explanation of benefits format using an appropriate DWC approved paper billing format, related to the health care in dispute not submitted by the requestor or a statement certifying that the carrier did not receive the provider's disputed billing prior to the dispute request;

(ii) a copy of all medical bill(s), in a paper billing format using an appropriate DWC approved paper billing format, relevant to the dispute, if different from that originally submitted to the carrier for reimbursement;

(iii) a copy of any pertinent medical records or other documents relevant to the fee dispute not already provided by the requestor;

(iv) a statement of the disputed fee issue(s), which includes:

(I) a description of the health care in dispute;

(II) a position statement of reasons why the disputed medical fees should not be paid;

(III) a discussion of how the Labor Code and Division rules, including fee guidelines, impact the disputed fee issues; and

(IV) a discussion regarding how the submitted documentation supports the respondent's position for each disputed fee issue; and

(V) documentation that discusses, demonstrates, and justifies that the amount the respondent paid is a fair and reasonable reimbursement in accordance with Labor Code §413.011 and §134.1 of this title if the dispute involves health care for which the Division has not established a MAR, as applicable.

(B) The response shall address only those denial reasons presented to the requestor prior to the date the request for MDR was filed with the Division and the other party. Any new denial reasons or defenses raised shall not be considered in the review. If the response includes unresolved issues of compensability, extent of injury, liability, or medical necessity, the request for MDR will be dismissed in accordance with subsection (e)(3)(G) or (H) of this section.

(C) If the carrier did not receive the provider's disputed billing or the employee's reimbursement request relevant to the dispute prior to the request, the carrier shall include that information in a written statement in the response the carrier submits to the Division.

(D) If the medical fee dispute involves compensability, extent of injury, or liability, the carrier shall attach a copy of any related Plain Language Notice in accordance with §124.2 of this title (relating to Carrier Reporting and Notification Requirements).

(E) If the medical fee dispute involves medical necessity issues, the carrier shall attach a copy of documentation that supports an adverse determination in accordance with §19.2005 of this title (relating to General Standards of Utilization Review).

(3) Provider Response. Upon receipt of the request, the provider shall complete the required sections of the request form and provide any missing information not provided by the requestor and known to the provider. The response shall include:

(A) any documentation, including medical bills, in a paper billing format using an appropriate DWC approved billing format, and employee payment receipts, supporting the reasons why the refund request was denied;

(B) a statement of the disputed fee issue(s), which includes a discussion regarding how the submitted documentation supports the provider's position for each disputed fee issue; and

(C) a copy of the provider's refund payment, if applicable.

(e) MDR Action. The Division will review the completed request and response to determine appropriate MDR action.

(1) Request for Additional Information. The Division may request additional information from either party to review the medical fee issues in dispute. The additional information must be received by the Division no later than 14 days after receipt of this request. If the Division does not receive the requested additional information within 14 days after receipt of the request, then the Division may base its decision on the information available. The party providing the additional information shall forward a copy of the additional information to all other parties at the time it is submitted to the Division.

(2) Issues Raised by the Division. The Division may raise issues in the MDR process when it determines such an action to be appropriate to administer the dispute process consistent with the provisions of the Labor Code and Division rules.

(3) Dismissal. The Division may dismiss a request for medical fee dispute resolution if:

(A) the requestor informs the Division, or the Division otherwise determines, that the dispute no longer exists;

(B) the requestor is not a proper party to the dispute pursuant to subsection (b) of this section;

(C) the Division determines that the medical bills in the dispute have not been submitted to the carrier for reconsideration;

(D) the fee disputes for the date(s) of health care in question have been previously adjudicated by the Division;

(E) the request for medical fee dispute resolution is untimely;

(F) the Division determines the medical fee dispute is for health care services provided pursuant to a private contractual fee arrangement;

(G) the request contains an unresolved adverse determination of medical necessity, the Division shall notify the parties of the review requirements pursuant to §133.308 of this subchapter (relating to MDR by Independent Review Organizations) and will dismiss the request in accordance with the process outlined in §133.305 of this subchapter (relating to MDR--General);

(H) the carrier has raised a dispute pertaining to compensability, extent of injury, or liability for the claim, the Division shall notify the parties of the review requirements pursuant to §124.2 of this title, and will dismiss the request until those disputes have been resolved by a final decision, inclusive of all appeals;

(I) the request for medical fee dispute resolution was not submitted in compliance with the provisions of the Labor Code and this chapter; or

(J) the Division determines that good cause exists to dismiss the request, including a party's failure to comply with the provisions of this section.

(4) Decision. The Division shall send a decision to the disputing parties and to representatives of record for the parties and post the decision on the Department Internet website.

(5) Division Fee. The Division may assess a fee in accordance with §133.305 of this subchapter.

(f) Appeal to Contested Case Hearing. A party to a medical fee dispute may seek review of the MDR decision or dismissal as provided in this subsection. Parties are deemed to have received the MDR decision as provided in §102.5 of this title.

(1) A party to a medical fee dispute in which the amount of reimbursement sought by the requestor in its request for MDR is greater than $2000.00, may request a contested case hearing before the State Office of Administrative Hearings (SOAH).

(A) To request a contested case hearing before SOAH, a party shall file a written request for a SOAH hearing with the Division's Chief Clerk of Proceedings in accordance with §148.3 of this title (relating to Requesting a Hearing).

(B) The party seeking review of the MDR decision shall deliver a copy of its written request for a hearing to all other parties involved in the dispute at the same time the request for hearing is filed with the Division.

(2) A party to a medical fee dispute in which the amount of reimbursement sought by the requestor in its request for MDR is equal to or less than $2000.00 may request a Division contested case hearing conducted by a Division hearing officer. A benefit review conference is not a prerequisite to a Division contested case hearing under this paragraph.

(A) To request a Division contested case hearing, a written request for a Division contested case hearing must be filed with the Division's Chief Clerk no later than the later of the 20th day after the effective date of this section or the 20th day after the date on which the decision is received by the appealing party. The request must be filed in compliance with Division rules. The party appealing the decision shall deliver a copy of its written request for a hearing to all other parties involved in the dispute at the same time the request for a hearing is filed with the Division.

(B) Requests that are timely submitted to a Division location other than the Division's Chief Clerk, such as a local field office of the Division, will be considered timely filed and forwarded to the Chief Clerk for processing; however this may result in a delay in the processing of the request. Any decision that is not timely appealed becomes final.

(C) Prior to a Division contested case hearing, either party may request a correction of a clerical error in a decision. Clerical errors are non-substantive and include, but are not limited to, typographical or mathematical calculation errors. Only the Division can determine if a clerical correction is required. A request for a correction of a clerical error does not alter the deadlines for appeal.

(D) At a Division contested case hearing under this paragraph, parties may not raise issues regarding liability, compensability, or medical necessity at a contested case hearing for a medical fee dispute.

(E) Except as otherwise provided in this section, a Division contested case hearing shall be conducted in accordance with Chapters 140 and 142 of this title (relating to Dispute Resolution/General Provisions and Benefit Contested Case Hearing).

(F) A party to a medical fee dispute who has exhausted all administrative remedies may seek judicial review of the Division's decision. Judicial review under this paragraph shall be conducted in the manner provided for judicial review of contested cases under Chapter 2001, Subchapter G Government Code. The parties will be deemed to have received the decision as provided in §102.5 of this title. A decision becomes final and appealable when issued by a Division hearing officer. If a party to a medical fee dispute files a petition for judicial review of the Division's decision, the party shall, at the time the petition is filed with the district court, send a copy of the petition for judicial review to the Division's Chief Clerk. The Division and the Department are not considered to be parties to the medical dispute pursuant to Labor Code §§413.031(k-2) and 413.0311(e). The following information must be included in the petition or provided by cover letter:

(i) the DWC number(s) for the dispute being appealed;

(ii) the names of the parties;

(iii) the cause number;

(iv) the identity of the court; and

(v) the date the petition was filed with the court.

(G) The Division shall, upon receipt of the court petition, prepare a record of the Division contested case hearing and submit a copy of the record to the district court. The Division shall assess the party seeking judicial review expenses incurred by the Division in preparing the certified copy of the record, including transcription costs, in accordance with Government Code §2001.177 (relating to Costs of Preparing Agency Record). Upon request, the Division shall consider

the financial ability of the party to pay the costs, or any other factor that is relevant to a just and reasonable assessment of costs.

§133.308. MDR by Independent Review Organizations.

(a) Applicability. The applicability of this section is as follows.

(1) This section applies to the independent review of network and non-network preauthorization, concurrent, or retrospective medical necessity disputes that is remanded to the Division or filed on or after May 25, 2008. Except as provided in paragraph (2) of this subsection, dispute resolution requests filed prior to May 25, 2008, shall be resolved in accordance with the statutes and rules in effect at the time the request was filed.

(2) Paragraph (1) of subsection (t) of this section applies to the independent review of network and non-network preauthorization, concurrent, or retrospective medical necessity disputes for a dispute resolution request that is:

(A) pending for adjudication by the Division on September 1, 2007;

(B) remanded to the Division on or after September 1, 2007; or

(C) filed on or after September 1, 2007.

(3) When applicable, retrospective medical necessity disputes shall be governed by the provisions of Labor Code §413.031(n) and related rules.

(4) All independent review organizations (IROs) performing reviews of health care under the Labor Code and Insurance Code, regardless of where the independent review activities are located, shall comply with this section. The Insurance Code, the Labor Code and related rules govern the independent review process.

(b) IRO Certification. Each IRO performing independent review of health care provided in the workers' compensation system shall be certified pursuant to Insurance Code Chapter 4202.

(c) Professional licensing requirements. Notwithstanding Insurance Code Chapter 4202, an IRO that uses doctors to perform reviews of health care services provided under this section may only use doctors licensed to practice in Texas.

(d) Professional specialty requirements. Notwithstanding Insurance Code Chapter 4202, an IRO doctor, other than a dentist or a chiropractor, performing a review under this section shall be a doctor who would typically manage the medical or dental condition, procedure, or treatment under consideration for review, and who is qualified by education, training and experience to provide the health care reasonably required by the nature of the injury to treat the condition until further material recovery from or lasting improvement to the injury can no longer reasonably be anticipated. A dentist meeting the requirements subsection (c) of this section may perform a review of a dental service under this section, and a chiropractor meeting the requirements of subsection (c) of this section may perform a review of a chiropractic service under this section. Nothing in this subsection can be construed to limit an injured employee's ability to receive health care in accordance with the Labor Code and Division rules or to limit a review of health care to only health care provided or requested prior to the date of maximum medical improvement.

(e) Conflicts. Conflicts of interest will be reviewed by the Department consistent with the provisions of the Insurance Code §4202.008, Labor Code §413.032(b), §12.203 of this title (relating to Conflicts of Interest Prohibited), and any other related rules. Notification of each IRO decision must include a certification by the IRO that the reviewing provider has certified that no known conflicts of interest exist between that provider, the employee, any of the treating providers, or any of the providers who reviewed the case for determination prior to referral to the IRO.

(f) Monitoring. The Division will monitor IROs under Labor Code §§413.002, 413.0511, and 413.0512. The Division shall report the results of the monitoring of IROs to the Department on at least a quarterly basis.

(g) Requestors. The following parties may be requestors in medical necessity disputes:

(1) In network disputes:

(A) health care providers (providers), or qualified pharmacy processing agents acting on behalf of a pharmacy, as described in Labor Code §413.0111, for preauthorization, concurrent, and retrospective medical necessity dispute resolution; and

(B) employees for preauthorization, concurrent, and retrospective medical necessity dispute resolution.

(2) In non-network disputes:

(A) providers, or qualified pharmacy processing agents acting on behalf of a pharmacy, as described in Labor Code §413.0111, for preauthorization, concurrent, and retrospective medical necessity dispute resolution; and

(B) employees for preauthorization and concurrent medical necessity dispute resolution; and, for retrospective medical necessity dispute resolution when reimbursement was denied for health care paid by the employee.

(h) Requests. A request for independent review must be filed in the form and manner prescribed by the Department. The Department's IRO request form may be obtained from:

(1) the Department's Internet website at www.tdi.state.tx.us; or

(2) the Health and Workers' Compensation Network Certification and Quality Assurance Division, Mail Code 103-6A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

(i) Timeliness. A requestor shall file a request for independent review with the insurance carrier (carrier) that actually issued the adverse determination or the carrier's utilization review agent (URA) that actually issued the adverse determination no later than the 45th calendar day after receipt of the denial of reconsideration. The carrier shall notify the Department of a request for an independent review within one working day from the date the request is received by the carrier or its URA. In a preauthorization or concurrent review dispute request, an employee with a life-threatening condition, as defined in §133.305 of this subchapter (relating to MDR--General), is entitled to an immediate review by an IRO and is not required to comply with the procedures for a reconsideration.

(j) Dismissal. The Department may dismiss a request for medical necessity dispute resolution if:

(1) the requestor informs the Department, or the Department otherwise determines, that the dispute no longer exists;

(2) the requestor is not a proper party to the dispute pursuant to subsection (g) of this section;

(3) the Department determines that the dispute involving a non-life-threatening condition has not been submitted to the carrier for reconsideration;

(4) the Department has previously resolved the dispute for the date(s) of health care in question;

(5) the request for dispute resolution is untimely pursuant to subsection (i) of this section;

(6) the request for medical necessity dispute resolution was not submitted in compliance with the provisions of this subchapter; or

(7) the Department determines that good cause otherwise exists to dismiss the request.

(k) IRO Assignment and Notification. The Department shall review the request for IRO review, assign an IRO, and notify the parties about the IRO assignment consistent with the provisions of Insurance Code §4202.002(a)(1), §1305.355(a), Chapter 12, Subchapter F of this title (related to Random Assignment of Independent Review Organizations), any other related rules, and this subchapter.

(l) Carrier Document Submission. The carrier or the carrier's URA shall submit the documentation required in paragraphs (1) - (6) of this subsection to the IRO not later than the third working day after the date the carrier receives the notice of IRO assignment. The documentation shall include:

(1) the forms prescribed by the Department for requesting IRO review;

(2) all medical records of the employee in the possession of the carrier or the URA that are relevant to the review, including any medical records used by the carrier or the URA in making the determinations to be reviewed by the IRO;

(3) all documents, guidelines, policies, protocols and criteria used by the carrier or the URA in making the decision;

(4) all documentation and written information submitted to the carrier in support of the appeal;

(5) the written notification of the initial adverse determination and the written adverse determination of the reconsideration; and

(6) any other information required by the Department related to a request from a carrier for the assignment of an IRO.

(m) Additional Information. The IRO shall request additional necessary information from either party or from other providers whose records are relevant to the review.

(1) The party or providers with relevant records shall deliver the requested information to the IRO as directed by the IRO. If the provider requested to submit records is not a party to the dispute, the carrier shall reimburse copy expenses for the requested records pursuant to §134.120 of this title (relating to Reimbursement for Medical Documentation). Parties to the dispute may not be reimbursed for copies of records sent to the IRO.

(2) If the required documentation has not been received as requested by the IRO, the IRO shall notify the Department and the Department shall request the necessary documentation.

(3) Failure to provide the requested documentation as directed by the IRO or Department may result in enforcement action as authorized by statutes and rules.

(n) Designated Doctor Exam. In performing a review of medical necessity, an IRO may request that the Division require an examination by a designated doctor and direct the employee to attend the examination pursuant to Labor Code §413.031(g) and §408.0041. The IRO request to the Division must be made no later than 10 days after the IRO receives notification of assignment of the IRO. The treating doctor and carrier shall forward a copy of all medical records, diagnostic reports, films, and other medical documents to the designated doctor appointed by the Division, to arrive no later than three working days prior to the scheduled examination. Communication with the designated doctor is prohibited regarding issues not related to the medical necessity dispute. The designated doctor shall complete a report and file it with the IRO, on the form and in the manner prescribed by the Division no later than seven working days after completing the examination. The designated doctor report shall address all issues as directed by the Division.

(o) Time Frame for IRO Decision. The IRO will render a decision as follows:

(1) for life-threatening conditions, no later than eight days after the IRO receipt of the dispute;

(2) for preauthorization and concurrent medical necessity disputes, no later than the 20th day after the IRO receipt of the dispute;

(3) for retrospective medical necessity disputes, no later than the 30th day after the IRO receipt of the IRO fee; and

(4) if a designated doctor examination has been requested by the IRO, the above time frames begin on the date of the IRO receipt of the designated doctor report.

(p) IRO Decision. The decision shall be mailed or otherwise transmitted to the parties and to representatives of record for the parties and transmitted in the form and manner prescribed by the Department within the time frames specified in this section.

(1) The IRO decision must include:

(A) a list of all medical records and other documents reviewed by the IRO, including the dates of those documents;

(B) a description and the source of the screening criteria or clinical basis used in making the decision;

(C) an analysis of, and explanation for, the decision, including the findings and conclusions used to support the decision;

(D) a description of the qualifications of each physician or other health care provider who reviewed the decision;

(E) a statement that clearly states whether or not medical necessity exists for each of the health care services in dispute;

(F) a certification by the IRO that the reviewing provider has no known conflicts of interest pursuant to the Insurance Code Chapter 4201, Labor Code §413.032, and §12.203 of this title; and

(G) if the IRO's decision is contrary to:

(i) the Division's policies or guidelines adopted under Labor Code §413.011, the IRO must indicate in the decision the specific basis for its divergence in the review of medical necessity of non-network health care; or

(ii) the network's treatment guidelines, the IRO must indicate in the decision the specific basis for its divergence in the review of medical necessity of network health care.

(2) The notification to the Department shall also include certification of the date and means by which the decision was sent to the parties.

(q) Carrier Use of Peer Review Report after an IRO Decision. If an IRO decision determines that medical necessity exists for health care that the carrier denied and the carrier utilized a peer review report on which to base its denial, the peer review report shall not be used for

subsequent medical necessity denials of the same health care services subsequently reviewed for that compensable injury.

(r) IRO Fees. IRO fees will be paid in the same amounts as the IRO fees set by Department rules. In addition to the specialty classifications established as tier two fees in Department rules, independent review by a doctor of chiropractic shall be paid the tier two fee. IRO fees shall be paid as follows:

(1) In network disputes, a preauthorization, concurrent, or retrospective medical necessity dispute for health care provided by a network, the carrier must remit payment to the assigned IRO within 15 days after receipt of an invoice from the IRO;

(2) In non-network disputes, IRO fees for disputes regarding non-network health care must be paid as follows:

(A) in a preauthorization or concurrent review medical necessity dispute or retrospective medical necessity dispute resolution when reimbursement was denied for health care paid by the employee, the carrier shall remit payment to the assigned IRO within 15 days after receipt of an invoice from the IRO.

(B) in a retrospective medical necessity dispute, the requestor must remit payment to the assigned IRO within 15 days after receipt of an invoice from the IRO.

(i) if the IRO fee has not been received within 15 days of the requestor's receipt of the invoice, the IRO shall notify the Department and the Department shall dismiss the dispute with prejudice.

(ii) after an IRO decision is rendered, the IRO fee must be paid or refunded by the nonprevailing party as determined by the IRO in its decision.

(3) Designated doctor examinations requested by an IRO shall be paid by the carrier in accordance with the medical fee guidelines under the Labor Code and related rules.

(4) Failure to pay or refund the IRO fee may result in enforcement action as authorized by statute and rules and removal from the Division's Approved Doctor List.

(5) For health care not provided by a network, the non-prevailing party to a retrospective medical necessity dispute must pay or refund the IRO fee to the prevailing party upon receipt of the IRO decision, but not later than 15 days regardless of whether an appeal of the IRO decision has been or will be filed.

(6) The IRO fees may include an amended notification of decision if the Department determines the notification to be incomplete. The amended notification of decision shall be filed with the Department no later than five working days from the IRO's receipt of such notice from the Department. The amended notification of decision does not alter the deadlines for appeal.

(7) If a requestor withdraws the request for an IRO decision after the IRO has been assigned by the Department but before the IRO sends the case to an IRO reviewer, the requestor shall pay the IRO a withdrawal fee of $150 within 30 days of the withdrawal. If a requestor withdraws the request for an IRO decision after the case is sent to a reviewer, the requestor shall pay the IRO the full IRO review fee within 30 days of the withdrawal.

(8) In addition to Department enforcement action, the Division may assess an administrative fee in accordance with Labor Code §413.020 and §133.305 of this subchapter.

(9) This section shall not be deemed to require an employee to pay for any part of a review. If application of a provision of this section would require an employee to pay for part of the cost of a review, that cost shall instead be paid by the carrier.

(s) Defense. A carrier may claim a defense to a medical necessity dispute if the carrier timely complies with the IRO decision with respect to the medical necessity or appropriateness of health care for an employee. Upon receipt of an IRO decision for a retrospective medical necessity dispute that finds that medical necessity exists, the carrier must review, audit, and process the bill. In addition, the carrier shall tender payment consistent with the IRO decision, and issue a new explanation of benefits (EOB) to reflect the payment within 21 days upon receipt of the IRO decision.

(t) Appeal. A decision issued by an IRO is not considered an agency decision and neither the Department nor the Division are considered parties to an appeal. In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence. Appeals of IRO decisions will be as follows:

(1) Non-Network Appeal Procedures. A party to a medical necessity dispute may seek review of a dismissal or decision as follows:

(A) A party to a retrospective medical necessity dispute in which the amount billed is greater than $3,000 may request a hearing before the State Office of Administrative Hearings (SOAH) by filing a written request for a SOAH hearing with the Division's Chief Clerk of Proceedings in accordance with §148.3 of this title (relating to Requesting a Hearing). The party appealing the IRO decision shall deliver a copy of its written request for a hearing to all other parties involved in the dispute. The IRO is not required to participate in the SOAH hearing or any appeal.

(B) A party to a retrospective medical necessity dispute in which the amount billed is less than or equal to $3,000 or an appeal of an IRO decision regarding determination of the concurrent or prospective medical necessity for a health care service may appeal the IRO decision by requesting a Division CCH conducted by a Division hearing officer. A benefit review conference is not a prerequisite to a Division CCH under this subparagraph.

(i) The written appeal must be filed with the Division's Chief Clerk no later than the later of the 20th day after the effective date of this section or 20 days after the date the IRO decision is sent to the appealing party and must be filed in compliance with Division rules. Requests that are timely submitted to a Division location other than the Division's Chief Clerk, such as a local field office of the Division, will be considered timely filed and forwarded to the Chief Clerk for processing; however, this may result in a delay in the processing of the request.

(ii) The party appealing the IRO decision shall send a copy of its written request for a hearing to all other parties involved in the dispute. The IRO is not required to participate in the Division CCH or any appeal.

(iii) Except as otherwise provided in this section, a Division CCH shall be conducted in accordance with Chapters 140 and 142 of this title (relating to Dispute Resolution/General Provisions and Benefit Contested Case Hearing).

(iv) Prior to a Division CCH, a party may submit a request for a letter of clarification by the IRO to the Division's Chief Clerk. A copy of the request for a letter of clarification must be provided to all parties involved in the dispute at the time it is submitted to the Division. A request for a letter of clarification may not ask the IRO to reconsider its decision or issue a new decision.

(I) A party's request for a letter of clarification must be submitted to the Division no later than 10 days before the date set for hearing. The request must include a cover letter that contains the names of the parties and all identification numbers assigned to the hearing or the independent review by the Division, the Department, or the IRO.

(II) The Department will forward the party's request for a letter of clarification by the IRO to the IRO that conducted the independent review.

(III) The IRO shall send a response to the request for a letter of clarification to the Department and to all parties that received a copy of the IRO's decision within 5 days of receipt of the party's request for a letter of clarification. The IRO's response is limited to clarifying statements in its original decision; the IRO shall not reconsider its decision and shall not issue a new decision in response to a request for a letter of clarification.

(IV) A request for a letter of clarification does not alter the deadlines for appeal.

(v) A party to a medical necessity dispute who has exhausted all administrative remedies may seek judicial review of the Division's decision. Judicial review under this paragraph shall be conducted in the manner provided for judicial review of contested cases under Chapter 2001, Subchapter G Government Code. A decision becomes final and appealable when issued by a Division hearing officer. If a party to a medical necessity dispute files a petition for judicial review of the Division's decision, the party shall, at the time the petition is filed with the district court, send a copy of the petition for judicial review to the Division's Chief Clerk. The Division and the Department are not considered to be parties to the medical necessity dispute pursuant to Labor Code §§413.031(k-2) and 413.0311(e).

(vi) Upon receipt of a court petition seeking judicial review of a Division CCH held under this subparagraph, the Division shall prepare and submit to the district court a certified copy of the entire record of the Division CCH under review.

(I) The following information must be included in the petition or provided to the Division by cover letter:

(-a-) Any applicable Division docket number for the dispute being appealed;

(-b-) the names of the parties;

(-c-) the cause number;

(-d-) the identity of the court; and

(-e-) the date the petition was filed with the court.

(II) The record of the hearing includes:

(-a-) all pleadings, motions, and intermediate rulings;

(-b-) evidence received or considered;

(-c-) a statement of matters officially noticed;

(-d-) questions and offers of proof, objections, and rulings on them;

(-e-) any decision, opinion, report, or proposal for decision by the officer presiding at the hearing and any decision by the Division; and

(-f-) a transcription of the audio record of the Division CCH.

(III) The Division shall assess to the party seeking judicial review expenses incurred by the Division in preparing the certified copy of the record, including transcription costs, in accordance with the Government Code §2001.177 (relating to Costs of Preparing Agency Record). Upon request, the Division shall consider the financial ability of the party to pay the costs, or any other factor that is relevant to a just and reasonable assessment of costs.

(C) If a party to a medical necessity dispute properly requests review of an IRO decision by SOAH or through a Division CCH, the IRO, upon request, shall provide a record of the review and submit it to the requestor within 15 days of the request. The party requesting the record shall pay the IRO copying costs for the records. The record shall include the following documents that are in the possession of the IRO and which were reviewed by the IRO in making the decision including:

(i) medical records;

(ii) all documents used by the carrier in making the decision that resulted in the adverse determination under review by the IRO;

(iii) all documentation and written information submitted by the carrier to the IRO in support of the review;

(iv) the written notification of the adverse determination and the written determination of the reconsideration;

(v) a list containing the name, address, and phone number of each provider who provided medical records to the IRO relevant to the review;

(vi) a list of all medical records or other documents reviewed by the IRO, including the dates of those documents;

(vii) a copy of the decision that was sent to all parties;

(viii) copies of any pertinent medical literature or other documentation (such as any treatment guideline or screening criteria) utilized to support the decision or, where such documentation is subject to copyright protection or is voluminous, then a listing of such documentation referencing the portion(s) of each document utilized;

(ix) a signed and certified custodian of records affidavit; and

(x) other information that was required by the Department related to a request from a carrier or the carrier's URA for the assignment of the IRO.

(2) Network Appeal Procedures. A party to a medical necessity dispute may seek judicial review of a dismissal or the decision as provided in Insurance Code §1305.355 and Chapter 10 of this title (relating to Workers' Compensation Healthcare Networks).

(u) Non-Network Spinal Surgery Appeal. A party to a preauthorization or concurrent medical necessity dispute regarding spinal surgery may appeal the IRO decision in accordance with Labor Code §413.031(l) by requesting a Contested Case Hearing (CCH).

(1) The written appeal must be filed with the Division Chief Clerk no later than 20 days after the date the IRO decision is sent to the appealing party and must be filed in compliance with Division rules.

(2) The CCH must be scheduled and held not later than 20 days after Division receipt of the request for a CCH.

(3) The hearing and further appeals shall be conducted in accordance with Chapters 140, 142, and 143 of this title (relating to Dispute Resolution/General Provisions, Benefit Contested Case Hearing, and Review by the Appeals Panel).

(4) The party appealing the IRO decision shall deliver a copy of its written request for a hearing to all other parties involved in the dispute. The IRO is not required to participate in the CCH or any appeal.

(v) Medical Fee Dispute Request. If the requestor has an unresolved fee dispute related to health care that was found medically necessary, after the final decision of the medical necessity dispute, the requestor may file a medical fee dispute in accordance with §133.305 and §133.307 of this subchapter (relating to MDR of Fee Disputes).

(w) Enforcement. If the Department believes that any person is in violation of the Labor Code, Insurance Code, or related rules, the Department may initiate an enforcement action. Nothing in this section modifies or limits the authority of the Department or the Division.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 5, 2008.

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Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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Proposal publication date: December 14, 2007
For further information, please call: (512) 804-4715

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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 25. MEMBERSHIP CREDIT
SUBCHAPTER B. COMPENSATION

34 TAC §25.21

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS) adopts amended §25.21, concerning compensation subject to deposit and credit, with changes to the proposed text as published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 2000). Implementing the primary statutory provision regarding creditable compensation, §822.201 of the Government Code, the section establishes detailed provisions describing the types of active member compensation that are creditable in the TRS pension plan for purposes of determining member contributions and computing retiree benefits. The amended rule is adopted to delete references to obsolete legislation related to compensation designated as health care supplementation.

In 2006, House Bill 1, 79th Legislature, Third Called Session, amended §822.201 regarding salary designated as compensation supplementation as excludable from creditable compensation by the election of the employee. Subsequently, in 2007, Senate Bill 1877, 80th Legislature, further amended §822.201 to change the provision regarding treatment of such salary as TRS-creditable. The present amendments conform the TRS rule to the most recent amendments made in Senate Bill 1877 and remove the obsolete reference to House Bill 1.

The amendments provide that salary amounts designated as health care supplementation by an employee under Subchapter D, Chapter 22, Education Code, would be considered part of "salary and wages" and thus would be eligible to be considered creditable compensation. The amendments also make minor wording changes with respect to certain educator incentive programs established by statute to conform the language of the rule to the language of the statute as amended by Senate Bill 1877. Other changes are technical and non-substantive.

TRS adopts amended §25.21 with the following technical changes to the text as published in the *Texas Register:* In subsection (d)(7) of the amended section, the cross-reference to subsection (c)(8) of the same section is incorrect in the clause "The following are excluded from annual compensation: . . . payments, except as provided in subsection (c)(1), (2), (5), and (8) of this section, made to third parties for the benefit of a member; . . ." Instead of referring to subsection (c)(8), relating to a merit salary increase made under Education Code §51.962, the reference should be to subsection (c)(9), relating to amounts deducted from regular pay for a qualified transportation benefit under Government Code §659.202. The error arose when subsection (c)(8) was renumbered to become subsection (c)(9) as part of a previous set of amendments: the cross-reference in subsection (d)(7) was not amended to reflect to the renumbered provision. The changes do not require republication of the proposed rule.

No comments were received regarding the adoption of the amendments.

Statutory Authority: The amended section is adopted under the following statute: §825.102, Government Code, which authorizes the Board to adopt rules for the administration of the funds of the retirement system.

§25.21. Compensation Subject to Deposit and Credit.

(a) The contributions required from a member to the Teacher Retirement System of Texas are generally based upon the member's annual compensation. Benefits paid by the retirement system are also generally based in whole or in part upon the annual compensation credited to a member for certain school years. A member's annual compensation for any particular school year has the meaning given by the law and rules applicable for that year. Beginning with the 1981-1982 school year, and for school years thereafter, annual compensation consists of the salary and wages that are paid or payable to a member for employment which is eligible for membership in the retirement system during that school year.

(b) Some payments made by an employer to a member are not salary or wages, even though the payments may be otherwise considered as compensation under the employment contract or federal tax laws. In general salary and wages creditable and subject to deposit are those types of monetary compensation that are recurring base pay for periods of employment and that:

(1) are earned or accrue proportionally as the work is performed, so that a member terminating employment between pay periods is entitled to a proportional amount of the compensation based on either length of employment or amount of work performed;

(2) are paid or payable at fixed intervals, generally at the end of each pay period; and

(3) are not specifically excluded under subsection (d) of this section.

(c) The following types of monetary compensation are to be included in annual compensation:

(1) amounts deducted from regular pay for the state-deferred compensation program, for a tax-sheltered annuity, or for a deferred compensation arrangement qualifying under the United States Internal Revenue Code, §401(k);

(2) normal payroll deductions which are not tax-exempt or tax-deferred;

(3) additional compensation paid for additional duties, for longevity, for overtime worked as required by law, or for service in a particular location or specialty the employer determines requires additional compensation compared to other employees of that employer, provided that these payments clearly meet the requirements of subsection (b) of this section;

(4) delayed payments of lump-sum amounts which by law or contract should have been paid at fixed intervals and which otherwise meet the requirements of subsection (b) of this section provided the amounts are credited to the payroll period in which they were earned;

(5) amounts withheld from regular pay under a cafeteria plan as provided by §25.22 of this title (relating to Contributions to Cafeteria Plans and Deferred Compensation);

(6) performance pay provided it meets the requirements of the Texas Government Code §822.201(b)(4) and §25.24 of this chapter (relating to Performance Pay);

(7) compensation received under the relevant parts of the awards for student achievement program under Subchapter N of Chapter 21, Education Code, the educator excellence awards program under Subchapter O of Chapter 21, Education Code, or a mentoring program under §21.458, Education Code, that authorize compensation for service;

(8) a merit salary increase made under Education Code, §51.962;

(9) amounts deducted from regular pay for a qualified transportation benefit under Texas Government Code §659.202; and

(10) compensation designated as health care supplementation by an employee under Subchapter D, Chapter 22, Education Code.

(d) The following are excluded from annual compensation:

(1) allowances, including housing, car, and expense allowances;

(2) reimbursements for expenses;

(3) payments for accrued compensatory time for overtime worked or for accrued sick leave or vacation, except that continued payments of normal compensation when vacation or sick leave or compensatory time is actually taken by an employee will be included in annual compensation to the extent otherwise permitted by this section;

(4) benefits, except as provided in subsection (c)(1) of this section, which either are not subject to federal income tax or which will be subject to federal income tax in a future year;

(5) bonus and incentive payments , unless state law expressly provides that a type of bonus or incentive payment is to be considered TRS-creditable compensation or the payments otherwise qualify as performance pay under subsection (c)(6) of this section;

(6) employer payments for fringe benefits, including direct cash payments in lieu of fringe benefits, except as provided in §25.22 of this title (relating to Contributions to Cafeteria Plans and Deferred Compensation);

(7) payments, except as provided in subsection (c)(1), (2), (5), and (9) of this section, made to third parties for the benefit of a member;

(8) payments for work as an independent contractor or consultant;

(9) all nonmonetary compensation;

(10) active employee health coverage or compensation supplementation or any other amount received by an employee under former Article 3.50-8, Insurance Code; former Chapter 1580, Insurance Code; Subchapter D, Chapter 22, Education Code, as that subchapter existed on January 1, 2006; or Rider 9, page III-39, Chapter 1330, Acts of the 78th Legislature, Regular Session, 2003 (the General Appropriations Act), regardless of whether the employee receives the amount in cash, uses it for payment of health care coverage, or uses it for any other option available by law;

(11) any other fringe benefit;

(12) payments that an employer intentionally does not include in salary and wages because they are not expected to be permanently recurring in each pay period of employment or because they are not considered base pay and that, for the protection of the actuarial soundness of the retirement system, the type of payment should not be included in the calculation of a lifetime retirement benefit intended to replace a percentage of the member's base pay at retirement; and

(13) payments for terminating employment or paid as an incentive to terminate employment. Examples of such payments include payments for contract buy-outs, amounts paid pursuant to an agreement in which the employee agrees to terminate employment or to waive or release rights to future employment, and amounts paid pursuant to early retirement incentive programs or other programs intended to increase the compensation paid to the employee upon receipt of the resignation of the employee or the waiver or release of rights to future employment. Increased compensation paid in the final year of employment prior to retirement that exceeds increases approved by the employer for all employees or classes of employees is presumed to be payment for terminating employment.

(e) The maximum amount of compensation of any member that may be taken into account under the retirement system shall not exceed $150,000 for plan years commencing on or after September 1, 1996. For plan years commencing on or after January 1, 2002, the maximum amount of compensation shall not exceed the limit contained in the Internal Revenue Code §401(a)(17)(A), 26 United States Code §401(a)(17)(A). For plan years beginning before January 1, 1997, in determining the compensation of any member for any year, the family aggregation rules of the Internal Revenue Code, §414(q)(6), 26 United States Code §414(q)(6) shall apply except the term "family" shall include only the spouse of the member and any lineal descendants of the member who have not attained age 19 before the end of the year. The limits set forth in the first two sentences of this subsection shall be increased from time to time, to reflect cost of living increases, in accordance with the Internal Revenue Code, §401(a)(17), 26 United States Code §401(a)(17). The dollar limitation prescribed in the first two sentences of this subsection shall not apply to limit the compensation of any person who first becomes a member before September 1, 1996. Furthermore, that limitation shall not apply for any period during which such limitation is repealed or is not enforced by the Internal Revenue Service with regard to governmental plans. In applying the limits described in this section, a plan year is September 1 through August 31.

(f) TRS may rely upon employer certifications in determining creditable compensation or may conduct an investigation to determine whether any ineligible compensation has been reported. At the request of TRS, employers will provide copies of any records or information the retirement system requests. Such records may include, but are not limited to, copies of contracts, work agreements, salary schedules or addenda, board minutes, payroll records, or other materials that will assist the retirement system in making a determination.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 2, 2008.

TRD-200802338
Pattie Featherston
Chief Operating Officer
Teacher Retirement System of Texas
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For further information, please call: (512) 542-6438

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SUBCHAPTER F. VETERAN'S (USERRA) SERVICE CREDIT

34 TAC §25.71

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS) adopts amended §25.71, concerning service credit for eligible active military duty under the Uniformed Services Employment and Re-Employment Rights Act (USERRA), with changes to the proposed text as published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 2003). TRS adopts the amendments to make time periods in the rule for TRS-covered employees consistent with similar provisions in general state law for state and local government employees.

Section 25.71 establishes the opportunity to establish TRS service credit for a TRS member who leaves a TRS-covered employer in order to perform military duty. A federal law known as the Uniformed Services Employment and Re-Employment Rights Act ("USERRA") requires employers and retirement plans to protect access to jobs and benefits for eligible returning employees. This TRS rule implements the primary state statutory provision regarding TRS service credit established pursuant to USERRA, §823.304 of the Government Code.

A feature of USERRA, federal regulations implementing USERRA, and §25.71 is a requirement that a returning member return to, or apply for, re-employment with the employer within a certain number of days of discharge in order to trigger USERRA protections. Currently, the TRS rule requires that the member return to or apply for re-employment with the TRS-covered employer within 31 days of discharge, if the member served for less than 90 days, or within 90 days of discharge if the member served for 90 days or more. Chapter 613 of the Government Code, however, also addresses this issue with respect to a public employee who leaves a state or local governmental entity position. Section 613.004(a) specifies a 90-day period for application for re-employment in order to trigger the state law protections specified in Chapter 613. The 90-day period is applicable without regard to the length of active duty. Because of the possibility of confusion between this general state law and the specific TRS rule regarding the time periods for re-employment that determine eligibility to purchase USERRA service credit, TRS adopts amendments to §25.71 to match the 90-day period specified in general state law, regardless of the length of time of active duty.

The effect of the adopted amendments would be to permit a returning member up to 90 days to apply for, or return to, re-employment, regardless of the length of active duty, and still be eligible to purchase USERRA service credit under TRS, assuming all other conditions are met. Additionally, the adopted amendments recognize that federal USERRA regulations would extend the 90-day period for re-employment if, for example, the employee returned with an injury or illness incurred in, or aggravated during, military service and needed up to two years for hospitalization or convalescence.

TRS adopts amended §25.71 with the following change to the text as published in the *Texas Register:* In subsection (b), TRS substitutes language concerning the USERRA requirements for separation from uniformed service under "honorable conditions" for that requiring the returning member to have received an "honorable discharge" to be eligible for service or compensation credit, a change that does not require republication of the proposed rule.

No comments were received regarding the adoption of the amendments.

Statutory Authority: The amended section is adopted under the following statutes: §825.102, Government Code, which authorizes the Board to adopt rules for the administration of the funds of the retirement system and for the transaction of the business of the Board; and §823.304, which authorizes the Board to adopt rules in order to comply with the federal law relating to USERRA service credit.

§25.71. Service Credit for Eligible Active Military Duty under the Uniformed Services Employment and Re-Employment Rights Act.

(a) A member may obtain service credit for active military duty in lieu of or in addition to military service credit under §25.61 of this title (relating to Service Credit for Eligible Military Duty) if the member is eligible to obtain such service credit under the Uniformed Services Employment and Re-Employment Rights Act (USERRA), 38 United States Code §4301 et seq.

(b) A member who leaves a position in the employ of a Teacher Retirement System of Texas (TRS) covered employer to perform duty, on a voluntary or involuntary basis, in the uniformed services, as defined in the USERRA, is eligible to obtain service or compensation credit under this section if the member separates from uniformed service under honorable conditions or as otherwise provided by USERRA and returns to or applies for re-employment with a TRS covered employer within ninety (90) days of discharge or release from active military service. TRS shall consider the provisions of USERRA or regulations adopted pursuant to USERRA in determining eligibility of members who apply for or return to re-employment later than this period of time, due to illness or injury incurred in, or aggravated during, uniformed service.

(c) Notwithstanding any provisions of these rules to the contrary, contributions, benefits, and service credit with respect to qualified military service shall be provided in accordance with the Internal Revenue Code §414(u) and as required by USERRA.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 2, 2008.

TRD-200802339
Pattie Featherston
Chief Operating Officer
Teacher Retirement System of Texas
Effective date: May 22, 2008
Proposal publication date: March 7, 2008
For further information, please call: (512) 542-6438

♦ ♦ ♦

CHAPTER 29. BENEFITS
SUBCHAPTER A. RETIREMENT

34 TAC §29.1

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS) adopts new §29.1, concerning eligibility for service retirement, without changes to the proposed text as published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 2004), and the rule text will not be republished.

The primary statutory provision relating to service retirement eligibility is §824.202 of the Texas Government Code. In 2005, §824.202 was amended to change the retirement eligibility requirements for new members joining TRS after a specific date. The bill enacting the provision--Senate Bill 1691, 79th Legislature, Regular Session (2005)--contained the date "September 1, 2006," as well as the date September 1, 2007." Consequently, a new rule is needed to clearly reflect as part of the written retirement plan terms the date (September 1, 2007) that triggers the new service retirement eligibility requirements. Additionally, other statutory changes enacted in 2005 have made the administration of service retirement eligibility more complex, particularly with respect to members who were grandfathered with respect to certain provisions of state law repealed in 2005. The interplay of the grandfather provisions and the new retirement eligibility provisions require the adoption of a new rule to ensure that the written plan terms reflect how such members' eligibility for service retirement and benefits will be determined.

The adopted new rule addresses four topics, described as follows. First, the rule would clarify that the new service retirement eligibility requirements established in Senate Bill 1691 apply to persons joining TRS on or after September 1, 2007. Second, the rule would clarify that a member who is grandfathered under Senate Bill 1691 (i.e., a person for whom certain repealed provisions are continued in effect) but later terminates membership and then resumes membership on or after September 1, 2007, would retain grandfathered status. Third, the rule would clarify that a person who was a member before September 1, 2007, terminated membership by withdrawal of contributions, and then resumed membership on or after September 1, 2007, is subject to the new service retirement eligibility requirements, even if the person reinstates TRS credit cancelled by the withdrawal of contributions. Fourth, the rule would clarify that a person who was a member before September 1, 2007, whose membership terminated by absence from service but who did not withdraw contributions, and then resumed membership on or after September 1, 2007, and reactivated the account is eligible for service retirement based on the earliest date of service associated with the account.

No comments were received regarding the adoption of the new rule.

Statutory Authority: The new section is adopted under the following statute: §825.102, Texas Government Code, which authorizes the Board to adopt rules for eligibility for membership, for the administration of the funds of the retirement system, and for the transaction of the business of the Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 2, 2008.

TRD-200802340
Pattie Featherston
Chief Operating Officer
Teacher Retirement System of Texas
Effective date: May 22, 2008
Proposal publication date: March 7, 2008
For further information, please call: (512) 542-6438

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CHAPTER 31. EMPLOYMENT AFTER RETIREMENT
SUBCHAPTER B. EMPLOYMENT AFTER SERVICE RETIREMENT

34 TAC §31.15

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS) adopts amended §31.15, concerning the six-month exception to forfeiture of retirement annuity because of employment after retirement, without changes to the proposed text as published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 2005), and the rule text will not be republished.

Retirees who return to work after retirement with a TRS-covered employer are limited in the amount of work they may perform without forfeiting annuity payments. Generally, beginning in the school year after they retire, retirees may work up to six months in full-time employment without forfeiting an annuity. The monthly annuity is forfeited, however, for any month in which the retiree works after the sixth month. The recent move to a delayed start of school until late August resulted in more retirees having to work into June to complete the school year. Consequently, those retirees lost the June annuity because they worked only a few days at the beginning of that month.

Amending §824.602 of the Texas Government Code (relating to exceptions to the general rule of forfeiture of retirement annuity for employment after retirement), Senate Bill 1039 (80th Legislature, Regular Session, 2007) provided relief for retirees working under the six-month exception by authorizing the payment of the June annuity if those retirees could not complete all work under the contract by May 31 and the work did not extend beyond June 15 of that year. Further, many retirees lost annuity payments during the summer months because of attendance or participation in professional development activities. Senate Bill 1039 also addressed this concern by clarifying that attendance or participation in these types of activities would not be considered work for purposes of the six-month exception.

Amended §31.15 reflects those legislative changes and clarifies when the changes take effect. The amended section provides that a retiree working under the six-month exception may work into June but no later than June 15 without forfeiting the annuity for June, provided the work required under a work agreement or employment contract cannot be completed by May 31. The amended section also clarifies that attendance or participation in professional development activities that are not included in the total number of required days of work under the contract or work agreement are not considered work for purposes of this exception. Days of attendance or participation in professional development activities, in-service training, continuing education, or similar activities that are included in the number of days required under the employment contract or work agreement are not pro-

tected by these amendments and will result in the forfeiture of annuity if the attendance or participation occurs in any month in excess of six months (unless the attendance or participation occurs in June but no later than June 15).

No comments were received regarding the adoption of the amendments.

Statutory Authority: The amended section is adopted under the following statutes: §824.601, Government Code, which authorizes the retirement system to adopt rules necessary for administering Subchapter G (relating to Loss of Benefits on Resumption of Service) of Chapter 824; and §825.102, Government Code, which authorizes the Board to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and for the transaction of the business of the Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 1, 2008.

TRD-200802331
Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Effective date: May 21, 2008
Proposal publication date: March 7, 2008
For further information, please call: (512) 542-6438

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CHAPTER 35. PAYMENTS BY TRS

34 TAC §35.2

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS) adopts amended §35.2, concerning direct rollovers from TRS, with changes to the proposed text as published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 2008).

Section 35.2 recognizes the opportunity available under federal tax law for a person receiving an eligible distribution from TRS to make a rollover of that distribution to another eligible retirement plan, including an individual retirement account (IRA). Until the enactment of the federal Pension Protection Act of 2006, a rollover could be made only by the following persons: a TRS member or retiree; an alternate payee of a TRS member or retiree (i.e., a spouse or former spouse receiving payment of part of the participant's benefit under a qualified domestic relations order (QDRO)); or a surviving spouse of a TRS member or retiree. The Pension Protection Act now authorizes retirement plans to allow an eligible nonspouse beneficiary to rollover a payment that is otherwise eligible for rollover, such as a lump sum death benefit. The adopted amendments to §35.2 would formally include this opportunity as a feature of the TRS retirement plan.

To be eligible, the nonspouse beneficiary must be an individual or a trust that qualifies under federal tax law. Under federal tax law, an organization, such as a charity, or an estate named as beneficiary is not eligible to use this rollover provision.

TRS adopts amended §35.2 with the following changes to the text as published in the *Texas Register*: In subsections (a) - (c), language concerning rollover procedures is inserted to more closely reflect model plan provisions promulgated by the Internal Revenue Service. In subsections (a) and (b), language is inserted to reflect that, to the extent permitted under federal tax law, a rollover may be made to a Roth IRA, including by an eligible nonspouse beneficiary. The changes do not require republication of the proposed rule.

No comments were received regarding the adoption of the amendments.

Statutory Authority: The amended section is adopted under the following statutes: §825.102, Government Code, which authorizes the Board to adopt rules for the administration of the funds of the retirement system and for the transaction of the business of the Board; and §825.506, Government Code, which authorizes the Board to adopt rules to modify the retirement benefit plan to the extent necessary for it to be a qualified plan under federal law.

§35.2. Direct Rollovers from TRS.

(a) Notwithstanding any provision of the retirement plan to the contrary that would otherwise limit a distributee's election under this section, an eligible distributee of an eligible rollover distribution from the Teacher Retirement System of Texas (TRS) may elect, at the time and in the manner prescribed by TRS, to have any portion of the distribution paid directly to an eligible retirement plan or a Roth IRA specified by the distributee in a direct rollover, to the extent permitted by Internal Revenue Code of 1986 (IRC) , as amended, and guidance issued thereunder.

(b) To the extent permitted under the IRC, as amended, an individual beneficiary of a TRS participant, other than a surviving spouse or alternate payee, who is an eligible distributee of an eligible rollover distribution from TRS may elect, at the time and in the manner prescribed by TRS, to have any portion of the distribution paid directly to a traditional or Roth individual retirement account (IRA) or individual retirement annuity established for the purpose of receiving the distribution, specified by the distributee in a direct rollover, that shall be treated as an inherited IRA or annuity. A trust that is a beneficiary may be treated as a beneficiary eligible to make such an election only to the extent permitted under the IRC, as amended.

(c) TRS shall develop procedures to implement this section in accordance with the Internal Revenue Code of 1986, §401(a)(31), as amended, and related regulations. Terms used in this section, including eligible rollover distribution, eligible retirement plan, distributee, and direct rollover, shall have the meaning assigned in the IRC, as amended, and guidance issued thereunder.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 2, 2008.

TRD-200802341
Pattie Featherston
Chief Operating Officer
Teacher Retirement System of Texas
Effective date: May 22, 2008
Proposal publication date: March 7, 2008
For further information, please call: (512) 542-6438

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER H. PROFESSIONAL CONDUCT

37 TAC §1.114

The Texas Department of Public Safety adopts amendments to §1.114, concerning Major Infraction Applicable to Any Member, without changes to the proposed text as published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 922).

Adoption of amendments to §1.114 are necessary in order to incorporate an ethics policy that is consistent with the recently adopted Attorney General model ethics policy promulgated under Government Code, §572.051(d).

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 30, 2008.

TRD-200802301
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: May 20, 2008
Proposal publication date: February 1, 2008
For further information, please call: (512) 424-2135

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CHAPTER 15. DRIVER LICENSE RULES

SUBCHAPTER B. APPLICATION REQUIREMENTS--ORIGINAL, RENEWAL, DUPLICATE, IDENTIFICATION CERTIFICATES

37 TAC §15.24

The Texas Department of Public Safety adopts amendments to §15.24, concerning Identification of Applicants, without changes to the proposed text as published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 2011).

Adoption of amendments to the section is necessary in order to prevent circumvention of the Texas identification requirements. Individuals, who cannot meet the current Texas identification requirements, obtain driver licenses and identification certificates issued by other states with identification standards not equal to or greater than those required in Texas. The individuals then use the out of state driver licenses and identification certificates, issued under inferior identification requirements, as a form of secondary identification to obtain Texas driver licenses and identification certificates.

Additionally, individuals attempt to use traffic citations completed with unverified identifying information to obtain Texas driver licenses and identification certificates. These individuals contend that the citation is an original court order and should be considered as a form of secondary identification under the current rule. Adoption of amendments to the section would restrict the acceptable court orders to official name and gender changes, and would eliminate this circumvention of the Texas identification requirements.

Lastly, the department adopts amendments which would provide necessary uniformity regarding the validity period of acceptable federal documentation. Adoption of this amendment would require United States Bureau of Citizenship and Immigration Services documents to be issued for at least one year and with at least six months of validity remaining at the time of application.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 30, 2008.

TRD-200802302
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: May 20, 2008
Proposal publication date: March 7, 2008
For further information, please call: (512) 424-2135

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37 TAC §15.25

The Texas Department of Public Safety adopts amendments to §15.25, concerning Address of Applicants for an Original, Renewal or Duplicate Driver License or Identification Certificate, without changes to the proposed text as published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 2012).

Adoption of the amendments to §15.25 is necessary in order to prevent circumvention of the Texas application and residence requirements.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, §521.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 30, 2008.

TRD-200802303

Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: May 20, 2008
Proposal publication date: March 7, 2008
For further information, please call: (512) 424-2135

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Review

Texas Public Finance Authority

Title 34, Part 10

The Texas Public Finance Authority will review and consider for readoption, revision or repeal Chapters 221, 223, and 225, in accordance with the requirements of the Government Code §2001.039, which directs state agencies to review and consider for readoption each of their rules ever four years.

The Authority's Board will consider whether the reasons for adopting these chapters continue to exist and whether amendments are needed. Required amendments will be published as "Proposed Rules" in a future issue of the *Texas Register* and will be adopted in accordance with the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Comments or questions regarding this notice of intention to review the rules may be submitted in writing, within 30 days following the publication of this notice in the *Texas Register*, to Judith Porras, General Counsel, Texas Public Finance Authority, 300 W. 15th St., Suite 411, Austin, TX 78701, or by electronic mail to judith.porras@tpfa.state.tx.us.

TRD-200802335
Kimberly Edwards
Executive Director
Texas Public Finance Authority
Filed: May 2, 2008

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 37 TAC §9.22

TEXAS DEPARTMENT OF PUBLIC SAFETY

AMBER ALERT REQUEST FORM

Fax (512) 424-2281 or (512) 451-2291; and Call (512) 424-2277 or 2208

MAXIMUM ACTIVATION - 24 HOURS

Reporting Agency Information

Date of Request

Name of Reporting Agency

Name/Title of Investigating Officer

Contact number for Investigating Officer

Fax number for reporting agency

Authentication password

Phone number for media inquiries

YES	NO	
☐	☐	1. Is this child 17 years of age or younger?
☐	☐	2. Does the law enforcement agency believe that the child has been abducted, that is, unwillingly taken from their environment without permission from the child's parent or legal guardian or by the child's parent or legal guardian who commits an act of murder or attempted murder during the time of the abduction?
☐	☐	3. Is there reason to believe that the victim is in immediate danger of serious bodily harm or death?
☐	☐	4. Is it confirmed that an investigation has taken place that verifies the abduction and has eliminated alternative explanations for the missing child?
☐	☐	5. Is there sufficient information available to disseminate to the public that could assist in locating the child, suspect, or vehicle used in the abduction?

❖ **IMPORTANT:** Do **NOT** send AMBER ALERT if the answer is **NO** to **ANY** of these questions. **If activated, your request is only valid for a period of 24 hours.** You will be contacted after 12 hours, 18 hours, and 23 hours in which you may decide to request an extension. All requests for extension must be accomplished on or before the last 23 hour reminder from the State Operations Center. Contact (512) 424-2277 or 2208 for all requests for extensions.

Abduction Date: _____ Time: _____

Last known location: _____

VICTIM DATA: NIC#: _____

Name: _____

Age: _____ Sex: _____ Race: _____ DOB: _____ Height:_____Weight:_____

Eyes:_____Hair:_____Clothing:_____

Unique Physical Characteristics: _____

SUSPECT DATA:

Name: _____

Age: _____ Sex: _____ Race: _____ DOB: _____ Height:_____Weight:_____

Eyes:_____Hair:_____Clothing:_____

Unique Physical Characteristics: _____

VEHICLE DATA:

Make: _____ Model: _____ Year: _____ Color: _____

LP-State: _____ Number: _____

Any other descriptors: _____

MP-24 (Rev. 04/2008)

Figure: 37 TAC §9.32

TEXAS DEPARTMENT OF PUBLIC SAFETY

SILVER ALERT REQUEST FORM

Fax (512) 424-2281 or (512) 451-2291; and Call (512) 424-2277 or 2208

MAXIMUM ACTIVATION - 24 HOURS

Reporting Agency Information

Date of Request

Name of Reporting Agency

Contact number for Reporting Agency

Fax number for Reporting Agency

Name/Title of Investigating Officer

Cell phone number for Investigating Officer

Phone number for media inquiries

YES	NO	
☐	☐	1. Is the missing person 65 years of age or older?
☐	☐	2. Is the senior citizen's domicile in Texas?
☐	☐	3. Does the senior citizen have a diagnosed impaired mental condition, and does the senior citizen's disappearance pose a credible threat to the senior citizen's health and safety? (Law enforcement shall require the family or legal guardian of the missing senior citizen to provide documentation from a medical or mental health professional of the senior citizen's condition.)
☐	☐	4. Is it confirmed that an investigation has taken place verifying that the senior citizen's disappearance is due to his/her impaired mental condition, and alternative reasons for the senior citizen's disappearance have been ruled out?
☐	☐	5. Is the Silver Alert request within 72 hours of the senior citizen's disappearance?
☐	☐	6. Is there sufficient information available to disseminate to the public that could assist in locating the senior citizen? (Highway signs will be activated only if accurate vehicle information is available AND it is confirmed that the senior citizen was driving the vehicle at the time of the disappearance.)

❖ **IMPORTANT:** Agencies are responsible for accurately answering the above questions. The Department of Public Safety will verify circumstances of each request to ensure criteria have been met. Do **NOT** send SILVER ALERT request if the answer is **NO** to **ANY** of these questions. **If activated, your request is only valid for a period of 24 hours.** You will be contacted after 12 hours, 18 hours, and 23 hours in which you may decide to request an extension. Any extension must be requested prior to or during the 23 hour reminder from the State Operations Center. Contact (512) 424-2277 or 2208 for all extension requests.

Date of last contact: _____ Time: _____

Last known location: _____

SENIOR CITIZEN DATA NIC #: _____

Name: _____ Diagnosed Mental Condition: _____

Age: _____ Sex: _____ Race: _____ DOB: _____ Height: _____ Weight: _____

Eyes: _____ Hair: _____ Clothing: _____

Unique Physical Characteristics: _____

VEHICLE DATA

Make: _____ Model: _____ Year: _____ Color: _____

LP-State: _____ Number: _____

Any other descriptors: _____

MP-25 (Rev. 04/2008)

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Notice of Request for Applications - GO TEXAN Rural Community Beautification Program

The Rural Economic Development Division (REDD) of the Texas Department of Agriculture (TDA) hereby requests applications from communities for the GO TEXAN Rural Community Beautification Program for the period of May 19, 2008, through June 27, 2008. For program information, guidelines and applications contact Sherri Gothart-Barron, Program Coordinator, Rural Economic Development. Mrs. Gothart-Barron may be contacted by telephone in Austin at (512) 936-6339 or Toll free at (877) 428-7848, by fax at (888) 216-9867, or by e-mail at finance@tda.state.tx.us. Information may also be accessed by visiting the program information web page at: http://www.agr.state.tx.us/agr/program_render/0,1987,1848_20584_0_0,00.html?channelId=20584

The "GO TEXAN Rural Community Beautification Program" is a one-time matching funds program developed to assist a rural community in funding a downtown beautification project. Beautification projects must be designed to enhance the appearance of the downtown area through the use of (1) planters, (2) benches, (3) decorative light poles, (4) decorative flags and/or (5) decorative community welcome sign(s); must be permanent in nature; and not directed toward seasonal use. TDA expects that successful applicants will leverage TDA funding by utilizing community resources, such as volunteers from local civic groups, businesses, youth groups, organizations, etc., in a broader downtown beautification effort.

Eligibility. To be eligible for participation in the GO TEXAN Rural Community Beautification Program, the Applicant must be a city or county government that is a GO TEXAN Rural Community Program certified member and be in good standing with TDA. The Applicant will be the sole contact for the application and reimbursement. The Applicant will be responsible for providing the required application information and for the accuracy of the reimbursement requests.

Proposal Requirements. To apply for the GO TEXAN Rural Community Beautification program, the Applicant must (i) submit a fully completed and signed GO TEXAN Rural Community Beautification application; (ii) provide a signed copy of the GO TEXAN License and Agreement to use the GO TEXAN Certification Mark and Tagline; (iii) complete the Rural Community Beautification score sheet; (iv) submit a Proposed Budget; (v) provide support letters from each participating community organization; (vi) submit a signed Acknowledgement of Reading and Understanding Program Guidelines; and (vii) submit a signed original Resolution from the Community. The Applicant will notify TDA of any change in the status of the project. A maximum amount awarded per application is $5,000. The minimum amount awarded is $1,000. Each award requires a 1:1 match. Up to $2,500 of the total match amount can be in the form of in-kind support, which includes volunteer labor, landscaping materials, paint, cleaning supplies, etc. Total funds available for all awards are $100,000. The deadline for submission of applications is June 27, 2008, or until funds are depleted, whichever comes first. To be eligible, an Applicant must score no less than 45 points. Applications will be reviewed in the order received. In the event of a tie score, the tying applications will be ranked from lowest to highest based on the most recently available county poverty rate. Preference will be given to the application with the higher poverty rate.

All approved projects must not begin until the contract is signed and must be completed within 6 months from the date the contract is signed. All approved projects will be subject to audit and periodic reporting requirements. To receive reimbursements timely, all reimbursement requests must be received as described in the GO TEXAN Rural Community Beautification Program guidelines.

Only applications that further or enhance a rural downtown beautification project and are submitted by Applicants physically located in rural Texas will be considered. TDA reserves the right to terminate any award if it determines, in its sole discretion, that a project does not further or enhance the goals of the GO TEXAN Rural Community Beautification Program.

Proposals should be submitted to Sherri Gothart-Barron, Program Coordinator, Rural Economic Development, Texas Department of Agriculture, 1700 North Congress Avenue, 10th Floor, Austin, Texas 78701.

TRD-200802396
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: May 7, 2008

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Request for Proposals - GO TEXAN Rural Community Program Bootstrap Bucks Reimbursement Program

Pursuant to the Texas Administrative Code Title 4, Part 1, Chapter 29, §§29.20 - 29.33, the Marketing and Promotion Division of the Texas Department of Agriculture (department) requests proposals for the GO TEXAN Rural Community Program Bootstrap Bucks reimbursement program projects for the period of May 12, 2008, through August 31, 2009. The GO TEXAN Rural Community Bootstrap Bucks reimbursement program is designed to directly promote tourism by supporting and increasing economic activity in rural Texas communities. Program and project proposal application information can be obtained at: www.gotexan.org or by contacting the Funding Coordinator at (512) 463-7731 or (877) 99GO-TEX.

Eligibility. To be eligible for participation in the reimbursement funds program, an applicant must be a GO TEXAN Rural Community Certified member and in good standing with the department. Information on becoming a GO TEXAN Rural Community Certified member may be obtained at www.gotexan.org, or by contacting the Marketing Coordinator for Rural Texas Communities at (512) 463-6490 or (877) 99GO-TEX. A GO TEXAN Rural Community Certified member who is a city or county may submit a proposal on behalf of an event, festival or fair (hereinafter referred to as "event") in their community. The certified member will be responsible for providing the completed Assessment Form and any additional documentation or information requested by the department to indicate the impact of the project on the community or region. The department has the sole discretion to determine whether a project meets program eligibility requirements.

Proposal Requirements. Each project proposal must use the GO TEXAN Rural Community Bootstrap Bucks project proposal form, located on the GO TEXAN Web site at www.gotexan.org. Each project request submitted by an eligible applicant must describe the advertising or other market-oriented promotional activity to be carried out using reimbursement funds and must include: (i) a cover page including the name, title and address of applicant and, if applicable, agent's information; (ii) a brief description of the event that will be promoted with the dates and location of the event; (iii) how the GO TEXAN Rural Community Bootstrap Bucks reimbursement funds will affect and improve the event; (iv) how the GO TEXAN Rural Community Program will be promoted as part of this promotional campaign; (v) how the applicant will collect the necessary data required on the Assessment Form; (vi) identify one of allowed promotional materials: banners, posters, newspaper advertisements or radio/television broadcast spots which the applicant feels would best promote the event; (vii) a signed original Resolution Authorizing Application from the governing body of the applicant; and (viii) a signed original Procedures and Reimbursement Guidelines signature page. Please send one original for review by the Funding Coordinator. If the application is accepted by the Funding Coordinator, the application will then be distributed to the GO TEXAN Rural Community Bootstrap Bucks Review Committee.

Approved projects' events may not begin until August 27, 2008, and the resulting projects must be completed by August 31, 2009, or the date specified in the grant agreement, whichever is earlier. The GO TEXAN mark and tagline must be utilized on all approved activities or materials. The promotional items purchased with grant funds cannot be sold.

The following is the schedule of submission deadlines:

First Round: May 19, 2008

Deadline for Submission: June 30, 2008

Event Begin Date: August 27, 2008

For events occurring between August 27, 2008 - October 31, 2008.

Second Round: July 1, 2008

Deadline for Submission: July 31, 2008

Event Begin Date: October 1, 2008

For events occurring between October 1, 2008 - December 1, 2008.

Third Round: August 1, 2008

Deadline for Submission: August 31, 2008

Event Begin Date: November 1, 2008

For events occurring between November 1, 2008 - January 1, 2009.

Fourth Round: September 1, 2008

Deadline for Submission: September 30, 2008

Event Begin Date: December 1, 2008

For Event occurring between December 1, 2008 - February 1, 2009.

Fifth Round: October 1, 2008

Deadline for Submission: October 31, 2008

Event Begin Date: January 1, 2009

For event occurring between January 1, 2009 - March 1, 2009.

Sixth Round: November 1, 2008

Deadline for Submission: November 30, 2008

Event Begin Date: February 1, 2009

For event occurring between February 1, 2009 - April 1, 2009.

Seventh Round: December 1, 2008

Deadline for Submission: December 31, 2008

Event Begin Date: March 1, 2009

For event occurring between March 1, 2009 - May 1, 2009.

Eighth Round: January 1, 2009

Deadline for Submission: January 31, 2009

Event Begin Date: April 1, 2009

For Event occurring between April 1, 2009 - June 1, 2009.

Ninth Round: February 1, 2009

Deadline for Submission: February 28, 2009

Event Begin Date: May 1, 2009

For event occurring between May 1, 2009 - July 1, 2009.

Tenth Round: March 1, 2009

Deadline for Submission: March 31, 2009

Event Begin Date: June 1, 2009

For event occurring between June 1, 2009 - August 31, 2009.

All approved applicants must submit artwork and/or text for approval prior to the production of the approved activity or material to receive reimbursement of up to $2,500.00. The reimbursement process will not begin until the event has taken place and all required documentation is received by TDA. The approved applicants must submit all required reimbursement documentation within 30 days of the end of the event. All purchasing of approved budget items and the actual events must occur within the agreement period. All approved projects will be subject to audit and periodic reporting requirements.

Proposals should be submitted to: Debbie Wall, Funding Coordinator, Texas Department of Agriculture, 1700 North Congress Avenue, 11th Floor, Austin, Texas 78701. Ms. Wall may be contacted by telephone at (512) 463-7731, by fax at (888) 223-7150 or e-mail at debbie.wall@tda.state.tx.us for additional information about preparing the proposal.

Eligible GO TEXAN Rural Community members are allowed to receive up to two GO TEXAN Rural Community Bootstrap Bucks project awards in a biennium. The current biennium will end August 31, 2009.

All qualifying proposals will be evaluated by the GO TEXAN Rural Community Bootstrap Bucks Review Committee, which consists of the department's staff members, who are appointed by the Commissioner of Agriculture. The department's GO TEXAN Rural Community Bootstrap Bucks Review Committee will base its awards decisions on each Review Committee members' recommendations. Only project requests that further or enhance department's GO TEXAN Rural Community Program and are submitted by applicants physically located in Texas will be funded.

This program is subject to the availability of state funds. If funds become unavailable during the term of any project, any agreements may be reduced or terminated. The department reserves the right to terminate any resulting agreement if the city or county does not comply with the department's guidelines.

The announcement of the grant awards will be made by the Marketing Coordinator for Rural Texas Communities after the applications received by the department have been fully considered.

TRD-200802397
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: May 7, 2008

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Request for Proposals - GO TEXAN Rural Community Program Hometown STARS Matching Fund Program

Pursuant to the Texas Administrative Code Title 4, Part 1, Chapter 29, §§29.20 - 29.33, the Marketing and Promotion Division of the Texas Department of Agriculture (department) requests proposals for GO TEXAN Rural Community Program Hometown STARS matching fund program projects for the period of May 12, 2008, through August 31, 2009. The GO TEXAN Rural Community Hometown STARS matching fund reimbursement program is designed to directly promote tourism by supporting and increasing economic activity in rural Texas communities. Program and project proposal application information may be obtained at: www.gotexan.org or by contacting the Funding Coordinator at (512) 463-7731 or (877) 99GO-TEX.

Eligibility. To be eligible for participation in the matching funds program, an applicant must be a GO TEXAN Rural Community Certified member and in good standing with the department. Information on becoming a GO TEXAN Rural Community Certified member may be obtained at www.gotexan.org or by contacting the Marketing Coordinator for Rural Texas Communities at (512) 463-6490 or (877) 99GO-TEX. A GO TEXAN Rural Community Certified member who is a city or county may submit a proposal on behalf of an event, festival or fair (hereinafter referred to as "event") in their community. The certified member will be responsible for providing economic impact information, the community impact evaluation, visitor questionnaires and any additional documentation or information requested by the department to indicate the impact of the project on the community or region. The department has the sole discretion to determine whether a project meets program eligibility requirements.

Proposal Requirements. Each project proposal must use the GO TEXAN Rural Community Hometown STARS project proposal form, located on the GO TEXAN Web site at www.gotexan.org. Each project request submitted by an eligible applicant must describe the advertising or other market-oriented promotional activities to be carried out using matching funds and include: (i) a cover page including the name, title and address of applicant and, if applicable, the applicant's agent's information; (ii) a detailed specific narrative that contains a brief description of the community or city; (iii) a brief description of the tourism event that will be promoted, dates and location of the tourism event; (iv) why the applicant wants to promote the event, how the matching funds will be used to promote the tourism event; (v) how the GO TEXAN Rural Community Hometown STARS matching funds will improve the event; (vi) how the GO TEXAN Rural Community Program will be promoted as part of the event's promotional campaign; (vii) how the applicant will work with other entities to promote the event; (viii) what impact is expected from the event and how the applicant will collect the necessary data to measure the impact of the promotion; (ix) a detailed budget/activity request; (x) a signed original Resolution Authorizing Application from the governing body of the applicant; (xi) and a signed original Procedures and Reimbursement Guidelines signature page. Please send one original project request for review by the Funding Coordinator, if the application is accepted by the Funding Coordinator, you will be asked to send 5 additional copies that will be distributed to the GO TEXAN Rural Community Hometown STARS Review Committee.

Approved projects' events may not begin until August 27, 2008, and the projects must be completed by August 31, 2009, or the date specified in the resulting grant agreement.

The following is the schedule of submission deadlines:

First Round: May 19, 2008

Deadline for Submission: June 30, 2008

Event Begin Date: August 27, 2008

For events occurring between August 27, 2008 - December 31, 2008.

Second Round: August 1, 2008

Deadline for Submission: August 30, 2008

Event Begin Date: December 1, 2008

For events occurring between December 1, 2008 - March 31, 2009.

Third Round: October 1, 2008

Deadline for Submission: October 31, 2008

Event Begin Date: March 1, 2009

For events occurring between March 1, 2009 - June 30, 2009.

Fourth Round: January 2, 2009

Deadline for Submission: January 31, 2009

Event Begin Date: April 1, 2009

For event occurring between April 1, 2009 - July 31, 2009.

Fifth Round: March 1, 2009

Deadline for Submission: March 31, 2009

Event Begin Date: July 1, 2009

For event occurring between July 1, 2009 - August 31, 2009.

All purchasing of approved budget items and the actual events must occur within the grant agreement period. All approved projects will be subject to audit and periodic reporting requirements.

Proposals should be submitted to: Debbie Wall, Funding Coordinator, Texas Department of Agriculture, 1700 North Congress Avenue, 11th Floor, Austin, Texas 78701. Ms. Wall may be contacted by telephone at (512) 463-7731, by fax at (888) 223-7150 or e-mail at debbie.wall@tda.state.tx.us for additional information about preparing the proposal.

Eligible GO TEXAN Rural Community Certified members are allowed to receive up to two GO TEXAN Rural Community Hometown STARS project awards in a biennium. The current biennium will end August 31, 2009.

All qualifying proposals will be evaluated by the GO TEXAN Rural Community Hometown STARS Review Committee, which consists of TDA staff members, who are appointed by the Commissioner of Agriculture. Proposals will be selected for reimbursement funding on a competitive basis. The proposals will be rated in ten general categories by the GO TEXAN Rural Community Hometown STARS Review Committee. The ten categories are as follows: (i) the proposal displays a well planned vision for the tourism event promotion; (ii) the proposal presents concrete goals for this project; (iii) the proposal is unique and innovative; (iv) the anticipated results indicate a good return on investment; (v) the proposal includes efforts to effectively utilize regional resources; (vi) the event offers good potential to draw

new and returning visitors from outside the area; (vii) the promotion will further enhance the GO TEXAN Rural Community Program with a high level of visibility for GO TEXAN (viii) the proposed budget is appropriate and well developed; (ix) the proposal includes a well conceived and tangible plan for impact measurement; and (x) based on the information in the proposal, the promoted event appears to have a high probability for success with room to expand and grow. The department's GO TEXAN Rural Community Hometown STARS Review Committee will base its awards decisions on each Review Committee members' recommendations and each applicant's overall score. The factors that the department will consider when evaluating each application are subject to change, without notice, at the discretion of the department.

This program is subject to the availability of state funds. If funds become unavailable during the term of any project, any agreements may be reduced or terminated.

Only project requests that further or enhance the department's GO TEXAN Rural Community Program and are submitted by applicants physically located in Texas will be funded. The department reserves the right to terminate any resulting agreement if the city or county does not comply with the department guidelines.

The announcement of the grant awards will be made by the Marketing Coordinator for Rural Texas Communities after the applications received by the department have been fully considered.

TRD-200802398
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: May 7, 2008

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Office of the Attorney General

Notice of Settlement of CERCLA Natural Resource Damages Claim

Notice is hereby given by the State of Texas of the following proposed resolution of a claim for natural resource damages under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and applicable state law. The State of Texas, on behalf of Texas Commission on Environmental Quality ("TCEQ"), the Texas General Land Office ("GLO"), and the Texas Parks and Wildlife Department ("TPWD") (collectively, the "State Trustees") has reached an agreement with Beazer East, Inc., ("Beazer") to resolve Beazer's liability for natural resource damages at a former wood treatment facility ("the Site") in Texarkana, Bowie County. The Attorney General will consider any written comments received on the settlement within 30 days of the date of publication of this notice.

Case Title and Court: United States and Beazer East, Inc., in the United States District Court for the Eastern District of Texas, Beaumont Division

Background: The Site, which consists of 62 acres located approximately one mile west of downtown Texarkana, Bowie County, operated as a wood treatment facility from approximately 1910 until 1961. Beazer and/or a predecessor to Beazer owned and operated the Site from approximately 1940 to 1962. The former wood treatment facility used creosote compounds, metals, volatile organic hydrocarbons, and semi-volatile organic hydrocarbons in the wood preservation process. These substances were released to surface waters and groundwater affecting the Site's aquatic habitat and Waggoner Creek, which runs adjacent to the Site. The habitat types identified near Waggoner Creek, in the vicinity of the Site, are induced deciduous forest, riparian deciduous forest, serial shrub land/young forest, grassland, and open water.

In 1998, Beazer entered into a Memorandum of Agreement with the Federal and State Natural Resource Damage Trustees ("Trustees") to perform a cooperative, restoration-based assessment to address potential natural resource injuries at the Site. As a result of this assessment, the Trustees determined that hazardous substances released at or from the Site injured or potentially injured benthic sediment habitat and organisms, aquatic habitats and organisms, terrestrial wildlife, habitat for state and federally protected species, including migratory birds and waterfowl and other resources.

In 1984, the Environmental Protection Agency ("EPA") placed the Site on the National Priorities List. On September 23, 1988, EPA issued a record of decision for the Site calling for removal and treatment of contaminated soil and treatment of contaminated groundwater, including organic contaminants and non-aqueous phase liquids, in the upper aquifer. The soil removal and replacement activities were conducted in 1996, and a closeout report was accepted and signed by EPA in March 2003. The "Dense Non-Aqueous Phase Liquids ("DNAPL")/Groundwater Remedy Pilot Study Report and 100% Design" specific to the groundwater remediation system was approved by the EPA on January 15, 2002. The system has been constructed and is presently collecting DNAPL in groundwater to prevent seepage into Waggoner Creek as designed.

Nature of the Settlement: The Consent Decree requires Beazer to undertake a restoration project to provide for the restoration, replacement, or acquisition of the equivalent of the injured, destroyed, or lost natural resources. The restoration project, under the Consent Decree, will preserve into perpetuity, the Nature Conservancy of Texas's Lennox Woods Preserve ("LW Preserve") in Red River County, Texas. The project will preserve 76 acres of bottomland hardwood and wetland habitats with a substantial aquatic habitat component. The LW Preserve has high quality old-growth bottomland hardwood forest and contains extensive wetland, backwater, and riparian hardwood forest, which support numerous species of aquatic fauna, birds, mammals, reptiles, and amphibians. The LW Preserve will be protected in perpetuity through a conservation easement held by the Natural Area Preservation Association. The fee title of the LW Preserve will be held by the Nature Conservancy of Texas.

Proposed Settlement: The proposed settlement will resolve the Settling Defendants' liability to the State for Natural Resource Damages at the Site. In addition, the Settling Defendants' will reimburse the State Trustees for the cost of assessing the damage to the State's natural resources.

Public Comment: The Office of the Attorney General will receive comments relating to the proposed Agreed Final Judgment for 30 days following publication of this Notice. Comments should be addressed to Sarah Jane Utley, Assistant Attorney General, Natural Resources Division, P.O. Box 12548, Austin, Texas 78711-2548 and should refer to United States and State of Texas v. Beazer East, Inc. The proposed Agreed Final Judgment may be examined at the Office of the Attorney General, 300 West 15th Street, 10th Floor, Austin, Texas by appointment A copy of the proposed Agreed Final Judgment may be obtained by mail from the Office of the Attorney General.

For more information regarding this publication, contact Cindy Hodges, Agency Liaison, at (512) 936-1841.

TRD-200802332

Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: May 1, 2008

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of April 25, 2008, through May 1, 2008. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on May 7, 2008. The public comment period for this project will close at 5:00 p.m. on June 6, 2008.

FEDERAL AGENCY ACTIONS:

Applicant: South Texas Project Nuclear Operating Company; Location: The project is located approximately 12 miles south-southwest of the city limits of Bay City, and 10 miles north of Matagorda Bay, along the west bank of the Colorado River, Matagorda County, Texas. Project Description: STP Nuclear Operating Company (STPNOC) is applying for Combined Operating Licenses (COLs) to authorize the construction and operation of two new nuclear reactors (for a total of four) on the site of South Texas Project Electric Generating Station (STP). The Environmental Report (ER) related to this project provides an analysis of the impacts to the environment from site preparation, construction, operation, and decommissioning of the two additional nuclear reactors at the STP site. The combined impacts of all four nuclear reactors at the STP site are also considered. The total gross thermal megawatt output will be 3926 MWt and the net electrical output will be approximately 1300 Mwe per reactor. The new reactors will use a closed-loop cooling water system that would withdraw and discharge water from and to the Main Cooling Reservoir (MCR), similar to the existing cooling system for the existing reactors. Makeup water for the MCR will be withdrawn from the Colorado River using the pre-existing intake structure. The new reactors will use mechanical draft cooling towers to dissipate waste heat and a water storage basin for the safety related cooling system. CCC Project No.: 08-0129-F1. Type of Application: U.S. Nuclear Regulatory Commission License under §103 of the Atomic Energy Act of 1954, 42 United States Code Annotated, §2133.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above, including a copy the consistency certifications for inspection, may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200802361
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: May 6, 2008

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Comptroller of Public Accounts

Notice of Award

Pursuant to Chapter 2254, Subchapter B and Chapter 403, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of consulting contract award in connection with the Request for Proposals (RFP #183a) for consulting services to assist the Comptroller with an Appraisal Standards Review of the Harris County Appraisal District. A contract was awarded to McConnell Jones Lanier & Murphy LLP, 3040 Post Oak Boulevard, Suite 1600, Houston, Texas 77056. The total amount of the contract is not to exceed $200,000.00. The term of the contract is April 24, 2008 through December 31, 2008.

The notice of request for proposals (RFP #183a) was published in the February 8, 2008, issue of the *Texas Register* (33 TexReg 1161). The report is due on or before August 31, 2008.

TRD-200802284
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: April 30, 2008

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Notice of Contract Amendment

The Comptroller of Public Accounts (Comptroller) announces this notice of amendment of an outside counsel contract with Clark, Thomas & Winters, P.C., 300 West Sixth Street, 15th Floor, Austin, Texas 78701, to provide outside counsel services to the Texas Prepaid Higher Education Tuition Board under RFP 155c. The contract is effective through August 31, 2008.

The original notice of request for proposals (RFP #155c) was published in the April 25, 2003, issue of the *Texas Register* (28 TexReg 3618). The Notice of Award was published in the November 14, 2003, issue of the *Texas Register* (28 TexReg 10310).

The amendment adds $40,000.00 to the total amount of the contract for a new total of $160,000.00.

TRD-200802381
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: May 7, 2008

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Notice of Request for Proposals

Pursuant to §2107.003(c-1), Texas Government Code, the Comptroller of Public Accounts (Comptroller), announces its issuance of a Request for Proposals (RFP #180d) for the purpose of obtaining collection services from a qualified firm for the collection of certain delinquent state taxes that are required by law to be collected by the Comptroller. The successful respondent, if any, will be expected to begin performance of the contract on or after July 7, 2008 or as soon thereafter as practical.

Contact: Parties interested in submitting a proposal should contact Thomas H. Hill, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., ROOM G-24, Austin, Texas, 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. The Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP will be available for pick-up at the above-referenced address on May 16, 2008, after 10:00 a.m., Central Zone Time (CZT), and during normal business hours thereafter. The Comptroller is also making the RFP available electronically on the Electronic State Business Daily after May 16, 2008, 10:00 a.m. (CZT). The address of the Electronic State Business Daily is http://esbd.cpa.state.tx.us.

Non-Mandatory Letters of Intent and Questions: Letters of Intent are non-mandatory. All written inquiries, questions and non-mandatory Letters of Intent must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Thursday, May 29, 2008. Prospective proposers are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 463-3669 or e-mail them to contracts@cpa.state.tx.us to ensure timely receipt. Letters of Intent must be addressed to Thomas H. Hill, Assistant General Counsel, Contracts, and must be signed by an authorized representative of the responding entity. All responses to questions will be posted electronically on Wednesday, June 4, 2008 or as soon thereafter as practical, on the Electronic State Business Daily at: http://esbd.cpa.state.tx.us. Non-Mandatory Letters of Intent and Questions received after the deadline will not be considered. Respondents shall be solely responsible for confirming the timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Proposals must be received in the Assistant General Counsel for Contracts' Office at the location specified above (ROOM G-24) no later than 2:00 p.m. (CZT), on Monday, June 16, 2008. Proposals received in ROOM G-24 after this time and date will not be considered; respondents shall be solely responsible for verifying timely receipt of proposals and all required copies in the Issuing Office by the deadline.

Evaluation and Award Procedure: All proposals will be subject to evaluation by a committee based on the evaluation criteria and procedures set forth in the RFP.

The Comptroller reserves the right to accept or reject any or all proposals submitted. The Comptroller is not obligated to execute a contract on the basis of this notice or the distribution of any RFP. The Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events pertaining to this solicitation is as follows: Issuance of RFP - Friday, May 16, 2008, 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due - Thursday, May 29, 2008, 2:00 p.m. CZT; Official Responses to Questions posted - Wednesday, June 4, 2008, or as soon thereafter as practical, Proposals Due - Monday, June 16, 2008, 2:00 p.m. CZT; Contract Execution - July 7, 2008, or as soon thereafter as practical; Commencement of Contract Activities - July 7, 2008 or as soon thereafter as practical.

TRD-200802364
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: May 6, 2008

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 05/12/08 - 05/18/08 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 05/12/08 - 05/18/08 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of 05/01/08 - 05/31/08 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 05/01/08 - 05/31/08 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-200802386
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: May 7, 2008

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Texas Education Agency

Request for Applications Concerning Dropout Recovery Pilot Program, 2008-2010

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-08-116 from local educational agencies (LEAs); open-enrollment charter schools; institutions of higher education (IHEs); nonprofit organizations; education service centers (ESCs); and shared services arrangements of LEAs, open-enrollment charter schools, IHEs, nonprofit organizations, and ESCs to recover students who have dropped out of Texas public schools and ensure that they earn a high school diploma or demonstrate college readiness. Eligible applicants must (1) have been in operation for at least three years; (2) have been granted a charter or received accreditation from an accrediting entity appropriate to and with authority over the applicant if issuing high school diplomas; and (3) be financially stable.

Description. The Dropout Recovery Pilot Program is intended to offer students who have dropped out of public high school the opportunity to earn a high school diploma or demonstrate college readiness by certain defined means, as specified in the RFA. Qualifying students must be 25 years of age or younger, per Texas Education Code, §42.003(a), and must have dropped out of a Texas public school. To be considered a student who has dropped out, the student must have withdrawn from a Texas public high school and been reported to TEA with a leaver code in the Public Education Information Management System (PEIMS) that corresponds to the definition of a dropout for that school year in which the student withdrew.

Qualifying grantees will be required to conduct a needs assessment for each participating student and create a P-16 Individualized Graduation Plan for each student. Grantees must also develop a P-16 strategic plan and demonstrate in the grant application how the overall strategies address deficiencies identified by the needs assessment. Entities providing sectarian activities must provide assurance that the dropout recovery pilot program is nonsectarian. Grantees will be required to comply with all TEA requirements.

A base amount of no greater than $150,000 will be made available to each grantee for the purpose of planning and establishing an appropriate infrastructure. Each grantee will be eligible to receive benchmark payments for (1) each student who makes interim progress by meeting established benchmark standards toward achieving a high school diploma or demonstrating college readiness, and (2) each student who completes the program by either attaining a high school diploma or demonstrating college readiness. Grantees not eligible to receive funding through the Foundation School Program are also eligible to receive an additional set amount per student who reaches benchmark standards and/or completes the program by either attaining a high school diploma or demonstrating college readiness.

Dates of Project. The Dropout Recovery Pilot Program will be implemented during the 2008-2009 and 2009-2010 school years. Applicants should plan for a starting date of no earlier than August 15, 2008, and an ending date of no later than July 31, 2010.

Project Amount. The number of projects funded will depend on the number of eligible applicants that apply and the number of students they anticipate serving. Project funding in any subsequent period will be based on satisfactory progress of the first-period objectives and activities, on general budget approval by the commissioner of education, and on appropriations by the state legislature.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of the RFA may be obtained by writing the Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and phone number including area code. The announcement letter and complete RFA will also be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Further Information. For clarifying information about the RFA, contact Donnell Bilsky, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any information that is different from or in addition to information provided in the RFA will be provided only in response to written inquiries. Copies of all such inquiries and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Tuesday, July 1, 2008, to be eligible to be considered for funding.

TRD-200802389
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: May 7, 2008

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **June 16, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 16, 2008**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: AMC Facilities, LP; DOCKET NUMBER: 2008-0309-MWD-E; IDENTIFIER: RN101515773; LOCATION: Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 Texas Administrative Code (TAC) §305.125(1) and (5), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0012238001, Operational Requirements Number 1, by failing to ensure that the facility and all of its systems of treatment and control are properly operated and maintained; 30 TAC §305.125(2) and §7305.65, and the Code, §26.121(a), by failing to maintain authorization for the discharge of wastewater; 30 TAC §317.7(e), by failing to secure the wastewater treatment plant; and 30 TAC §21.4(e) and the Code, §5.702, by failing to pay outstanding consolidated water quality fees and associated late fees; PENALTY: $4,770; ENFORCEMENT COORDINATOR: Andrew Hunt, (512) 239-1203; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Ashmal, Inc. dba East 1st Grocery; DOCKET NUMBER: 2008-0194-PST-E; IDENTIFIER: RN101492312; LO-

CATION: Austin, Travis County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases; and 30 TAC §334.10(b) and §334.49(e)(2)(B), by failing to maintain UST records and make them immediately available for inspection; PENALTY: $4,375; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(3) COMPANY: City of Azle; DOCKET NUMBER: 2007-1798-MLM-E; IDENTIFIER: RN101609873; LOCATION: Tarrant County, Texas; TYPE OF FACILITY: lift station and wastewater system; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0011183003, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted limits for ammonia nitrogen and flow; and 30 TAC §305.125(1), TPDES Permit Number WQ0011183003 Number 2.g., and the Code, §26.121(a), by failing to prevent unauthorized discharges; PENALTY: $25,920; Supplemental Environmental Project (SEP) offset amount of $25,920 applied to Household Hazardous Waste Collection Event and Cleanup Event; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: BCWK, LP; DOCKET NUMBER: 2008-0267-MWD-E; IDENTIFIER: RN101527513; LOCATION: Humble, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.65 and §305.125(2) and the Code, §26.121(a), by failing to maintain authorization for the discharge of wastewater; PENALTY: $3,240; ENFORCEMENT COORDINATOR: Lauren Smitherman, (512) 239-5223; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: Best Mart, Inc. dba Kold Spot 32 and Kold Spot 37; DOCKET NUMBER: 2007-1880-PST-E; IDENTIFIER: RN101544252 and RN101564433; LOCATION: Mansfield, Tarrant County, Texas; TYPE OF FACILITY: convenience stores with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.72, by failing to report a suspected release within 24 hours of discovery; 30 TAC §334.74, by failing to investigate a suspected release within 30 days of discovery; 30 TAC §334.50(a)(1)(A) and the Code, §26.3475(c)(1), by failing to provide a method of release detection capable of detecting a release from any portion of the UST system; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.7(d)(3), by failing to provide an amended registration for any change or additional information regarding the USTs; 30 TAC §115.246(1), (5), and (7)(a) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain Stage II records at the station and make them available for inspection; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training and instruction in the operation and maintenance of the Stage II vapor recovery system (VRS) and that each employee received in-house Stage II training regarding the purpose and operation of the VRS; 30 TAC §115.222(1) and THSC, §382.085(b), by failing to comply with emission control requirements by failing to properly install the submerged fill tubes within six inches from the bottom of the tank; 30 TAC §334.48(c), by failing to conduct effective manual or automatic monthly inventory control procedures for the USTs at the station; and 30 TAC §115.242(3)(A) and THSC, §382.085(b), by failing to maintain the Stage II VRS in proper operating condition; PENALTY: $27,980; ENFORCEMENT COORDINATOR: Philip DeFrancesco, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Chesapeake Energy Marketing, Inc.; DOCKET NUMBER: 2008-0291-WR-E; IDENTIFIER: RN104790381; LOCATION: Johnson County, Texas; TYPE OF FACILITY: well drilling and fracturing lease; RULE VIOLATED: 30 TAC §297.11 and the Code, §11.121, by failing to obtain a water rights permit; PENALTY: $716; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: DCP Midstream, LP; DOCKET NUMBER: 2008-0096-AIR-E; IDENTIFIER: RN100825439; LOCATION: Panola County, Texas; TYPE OF FACILITY: natural gas transmission plant; RULE VIOLATED: 30 TAC §§116.115(b)(2)(F), 116.615(2), and 122.143(4), General Operating Permit Number 514, Site-wide requirements (b)(2) and (7)(B), and THSC, §382.085(b), by failing to comply with the represented volatile organic compound emission rate; and 30 TAC §122.143(4) and §122.145(2)(A), General Operating Permit Number 514, Site-wide requirements (b)(2), and THSC, §382.085(b), by failing to report all instances of deviation; PENALTY: $120,400; SEP offset amount of $48,160 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Household Hazardous Waste Clean-Up; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(8) COMPANY: Eastman Chemical Company; DOCKET NUMBER: 2007-2040-AIR-E; IDENTIFIER: RN100219815; LOCATION: Longview, Harrison County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §101.201(a)(1) and §122.143(4), Federal Operating Permit (FOP) Number O-01973, Special Terms and Conditions (STC) 2F and 21, and THSC, §382.085(b), by failing to notify the TCEQ regional office within the required 24 hours of a reportable emissions event; and 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), FOP Number O-01973, STC 10, Air Permit Number 8539, Special Condition (SC) 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $13,050; SEP offset amount of $5,220 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500l REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(9) COMPANY: First Texas Homes, Inc.; DOCKET NUMBER: 2008-0607-WQ-E; IDENTIFIER: RN105458640; LOCATION: Denton County, Texas; TYPE OF FACILITY: home builder; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: First Texas Homes, Inc.; DOCKET NUMBER: 2008-0618-WQ-E; IDENTIFIER: RN105458079; LOCATION: Denton County, Texas; TYPE OF FACILITY: home builder; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Honeywell International Inc.; DOCKET NUMBER: 2008-0077-AIR-E; IDENTIFIER: RN100217405; LOCATION: Orange, Jefferson County, Texas; TYPE OF FACILITY: plastics material manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), FOP Number O-01533, General Terms and Conditions and SC 13A, Air Permit P-1829, SC 3, and THSC, §382.085(b), by

failing to prevent unauthorized emissions; PENALTY: $2,025; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(12) COMPANY: JRS Mart, Inc. dba J C Korner; DOCKET NUMBER: 2008-0159-PWS-E; IDENTIFIER: RN101264810; LOCATION: Jones Creek, Brazoria County, Texas; TYPE OF FACILITY: gas station with public water supply; RULE VIOLATED: 30 TAC §290.39(e)(1) and §290.46(n)(1) and THSC, §341.035(c), by failing to submit "as-built" plans and specifications that describe the existing facilities; 30 TAC §290.41(c)(1)(A), by failing to locate ground water sources so there will be no danger of pollution from unsanitary surroundings; 30 TAC §290.41(c)(3)(J), by failing to provide the well with a concrete sealing block; and 30 TAC §290.46(v), by failing to install all water system electrical wiring in compliance with a local or national electrical code; PENALTY: $784; ENFORCEMENT COORDINATOR: Stephen Thompson, (512) 239-2558; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: Augustin Vu dba Louis Food Mart; DOCKET NUMBER: 2004-1250-PST-E; IDENTIFIER: RN102546561 and Petroleum Storage Tank Facility Identification Number 64854; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance; and 30 TAC §334.22(a) and the Code, §5.702, by failing to pay past due fees; PENALTY: $2,140; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: Richard Martini; DOCKET NUMBER: 2008-0042-WOC-E; IDENTIFIER: RN105304893; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: landfill; RULE VIOLATED: 30 TAC §30.5(a) and the Code, §37.003, by failing to obtain a license issued by the commission before engaging in activity, occupation, or profession for which a license is required; PENALTY: $2,813; SEP offset amount of $1,125 applied to Gulf Coast Waste Disposal Authority ("GCWDA") - River Lakes, Bays 'N Bayous Trash Bash; ENFORCEMENT COORDINATOR: John Shelton, (512) 239-2563; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15) COMPANY: Rhodia Inc.; DOCKET NUMBER: 2008-0102-IHW-E; IDENTIFIER: RN100220581; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §305.125(1) and §335.221(a)(6), 40 Code of Federal Regulations (CFR) §266.102(e)(4), Industrial and Hazardous Waste (IHW) Permit Number 50095, Provision Number V.I.3.c., and THSC, §382.085(b), by failing to maintain permitted emissions limits for the industrial furnace; 30 TAC §305.125(1) and §335.221(a)(6), 40 CFR §266.102(e)(7), IHW Permit Number 50095, Provision Number V.I.3.f., and THSC, §382.085(b), by failing to cease burning hazardous waste when changes in the combustion properties or feed rates of hazardous waste or changes in the industrial furnace design or operating conditions deviate from specified limits; and 30 TAC §305.125(1) and (9) and §335.6, and IHW Permit Number 50095, Provision Number V.II.B.4., by failing to report a noncompliance orally within 24 hours and provide a written submission within five days of the time the permittee becomes aware of the noncompliance; PENALTY: $14,000; ENFORCEMENT COORDINATOR: Thomas Greimel, (512) 239-5690; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: Salado Water Supply Corporation; DOCKET NUMBER: 2008-0344-PWS-E; IDENTIFIER: RN101176600; LOCATION: Salado, Bell County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.43(e), by failing to provide a properly constructed intruder-resistant fence; 30 TAC §290.43(c)(8), by failing to maintain the facility's standpipe in strict accordance with American Water Works Association standards; and 30 TAC §290.45(b)(1)(D)(iv), by failing to provide pressure tank capacity of 20 gallons per connection; PENALTY: $1,107; ENFORCEMENT COORDINATOR: Christopher Keffer, (512) 239-5610; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(17) COMPANY: Sunoco, Inc. (R&M); DOCKET NUMBER: 2008-0070-AIR-E; IDENTIFIER: RN100524008; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: polypropylene manufacturing plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), TCEQ Air Permit Number 3126A, General Condition Number 8, and SC Number 1, FOP Number O-02314, SC Number 6, and THSC, §382.085(b), by failing to operate the PP Flare; PENALTY: $11,100; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Texas Petrochemicals LP; DOCKET NUMBER: 2008-0331-AIR-E; IDENTIFIER: RN100219526; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 46307, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(b)(1)(G) and THSC, §382.085(b), by failing to properly report an emissions event; PENALTY: $8,086; SEP offset amount of $3,234 applied to Harris County Public Health and Environmental Services-Pollution Control Division's Fourier Transform Infra Red Project; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(19) COMPANY: The Goodyear Tire & Rubber Company; DOCKET NUMBER: 2008-0339-AIR-E; IDENTIFIER: RN100870898; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: synthetic rubber manufacturing plant; RULE VIOLATED: 30 TAC §116.715(a), Flexible Air Permit Number 6618, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $5,600; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: Value Family Homes-Denton, L.P. dba Denton Mobile Home Community; DOCKET NUMBER: 2007-2043-WQ-E; IDENTIFIER: RN101269611; LOCATION: Denton, Denton County, Texas; TYPE OF FACILITY: wastewater collection system; RULE VIOLATED: the Code, §26.121, by failing to prevent the unauthorized discharge of wastewater; the Code, §26.039(b), by failing to provide noncompliance notification to the TCEQ within 24 hours of becoming aware of the noncompliance; and 30 TAC §317.3(b)(3), by failing to properly maintain the collection system; PENALTY: $4,875; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: VIVEK LLC dba Sam Food Mart; DOCKET NUMBER: 2008-0069-PST-E; IDENTIFIER: RN101540698; LOCATION: Lewisville, Denton County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors; 30 TAC §115.245(2) and THSC, §382.085(b),

by failing to verify proper operation of the Stage II equipment; 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to onboard refueling vapor recovery compatible systems; and 30 TAC §115.242(3)(A) and THSC, §382.085(b), by failing to maintain the Stage II VRS in proper operating condition, as specified by the manufacturer and/or any applicable California Air Resource Board Executive Order, and free of defects; PENALTY: $8,000; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: Webb County; DOCKET NUMBER: 2007-1035-PWS-E; IDENTIFIER: RN102698719; LOCATION: Rio Bravo, Webb County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(d)(2)(B) and §290.110(b)(4) and THSC, §341.0315(c), by failing to maintain a disinfectant residual of 0.5 milligrams per liter total chlorine; 30 TAC §290.42(f)(1)(E)(ii), by failing to provide secondary containment for liquid chemical storage tanks; 30 TAC §290.42(j), by failing to provide American National Standards Institute/National Sanitation Foundation certification for all chemicals used as direct or indirect additives; 30 TAC §290.46(s), by failing to properly calibrate the laboratory equipment used for compliance testing; 30 TAC §290.46(f)(4)(B) and §290.110(e)(2), by failing to submit accurate and complete monthly operational reports for surface water treatment plants; 30 TAC §290.46(m), by failing to maintain the good working condition and general appearance of the system's facilities and equipment; and 30 TAC §290.41(e)(5) and §290.43(e), by failing to provide an intruder-resistant fence around all water system facilities and equipment; PENALTY: $5,980; SEP offset amount of $5,980 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(23) COMPANY: City of Wortham; DOCKET NUMBER: 2008-0044-PWS-E; IDENTIFIER: RN101386761; LOCATION: Wortham, Freestone County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.44(d)(1), by failing to properly install air release devices in the distribution system; 30 TAC §290.46(f)(2), by failing to maintain water works operation and maintenance records and make them available to commission personnel; 30 TAC §290.43(e), by failing to provide a properly constructed intruder-resistance fence for the system's storage tanks; 30 TAC §290.44(h)(1)(A), by failing to provide a backflow prevention assembly; 30 TAC §290.43(c)(1), by failing to provide the vent opening on the ground storage tank with a 16-mesh or finer corrosion-resistant screen; and 30 TAC §290.45(f)(4), by failing to provide a minimum of 0.6 gallons per minute per connection of the production capacity for a purchased water system; PENALTY: $5,358; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 490-3096; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-200802360
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 6, 2008

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Notice of District Petition

Notice issued May 1, 2008.

TCEQ Internal Control No. 09182007-D02A; Coastal Bend Land Investments LP (Petitioner) filed a petition for creation of Brazoria County Municipal Utility District No. 61 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the holder of title to a majority in value of the land to be included in the proposed District; (2) there is one lien holder, Bank of America, on the property to be included in the proposed District; (3) the proposed District will contain approximately an area of 310.2756 acres located within Brazoria County, Texas; and (4) the proposed District is within the corporate boundaries of the City of Manvel, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Resolution No. 2007-R-05, effective January 8, 2007, the City of Manvel, Texas, gave its consent to the creation of the proposed District. According to the petition, the Petitioners have conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $17,839,618.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en Español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200802384

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 7, 2008

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Notice of Water Quality Applications

The following notices were issued during the period of April 24, 2008 through May 5, 2008.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

AMBAR LONE STAR FLUID SERVICES LLC has applied for a renewal of TPDES Permit No. WQ0011679001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 1,500 gallons per day. The facility is located 500 feet northeast of the Galveston Ship Channel and approximately 2,200 feet southeast of the intersection of Pelican Island Boulevard and the entrance road to the Pennzoil Producing Company in the City of Galveston in Galveston County, Texas.

BRAZORIA COUNTY MUNICIPAL UTILITY DISTRICT NO 25 has applied for a renewal of TPDES Permit No. WQ0014322001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 750,000 gallons per day. The facility is located approximately 4,000 feet south of the intersection of County Road 59 and State Route 288 in Brazoria County, Texas.

CANYON REGIONAL WATER AUTHORITY has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014872001, to authorize the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 100,000 gallons per day. The facility will be located approximately 9,365 feet northeast of the intersection of Farm-to-Market Road 1117 and County Road 442, and approximately 12,600 feet directly north of the intersection of Tidwell Creek and an unnamed tributary in Guadalupe County, Texas.

CITY OF ANAHUAC & TRINITY BAY CONSERVATION DISTRICT has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0010396001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The facility is located on the west bank of Anahuac Ditch, approximately 2,200 feet southeast of the intersection of Farm-to-Market Road 563 and Poskey Road, southeast of the City of Anahuac in Chambers County, Texas.

CITY OF CARMINE has applied for a renewal of Permit No. WQ0012272001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 21,000 gallons per day via surface irrigation of 8.1 acres of non-public access pasture land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 0.8 mile northwest of the intersection of U. S. Highway 290 and State Highway Spur 458, north of the City of Carmine in Washington County, Texas.

CITY OF ROSENBERG has applied for a renewal of TPDES Permit No. WQ0010607004, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 95,000 gallons per day. The facility is located off the intersection of U.S. Highway 59 and Cottonwood Church Road, near Coon Creek in Fort Bend County, Texas.

CITY OF WALLER has applied for a renewal of TPDES Permit No. WQ0010310001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day. The facility is located at 102 Walnut Street, approximately 4,500 feet southeast of the intersection of U.S. Highway 290 and Farm-to-Market Road 362 in Waller County, Texas.

ERA INDEPENDENT SCHOOL DISTRICT has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, proposed Permit No. WQ0014864001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 15,000 gallons per day. The facility will be located at Farm-to-Market Road 922 at Hornet Drive in Era, in Cooke County, Texas.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO(S). 47 and 48 and Vicksburg Joint Powers Board has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to TPDES Permit No. WQ0012701001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 550,000 gallons per day to a daily average flow not to exceed 950,000 gallons per day. The facility is located approximately 800 feet north and 5,000 feet east of the intersection of Trammel Fresno Road and State Highway 6 in Fort Bend County, Texas.

HARRIS COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 84 has applied for a major amendment to TPDES Permit No. WQ0010558001 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 1,000,000 gallons per day to an annual average flow not to exceed 2,000,000 gallons per day. The facility is located at 16224 Bear Bayou Drive, southwest of the intersection of Bear Bayou Drive and North Avenue, in the Old River Subdivision in Harris County, Texas.

JAM-DOT FAMILY LIMITED PARTNERSHIP AND JAM-DOT DAIRY LLC has applied for a major amendment of, and conversion to an individual permit, Texas Pollutant Discharge Elimination System (TPDES) Registration No. WQ0003217000, for a Concentrated Animal Feeding Operation (CAFO), to authorize the applicant to operate an existing dairy cattle facility at a maximum capacity of 995 head, of which 995 head are milking cows, increase the on-site land used for land application from 357 acres to 379 acres, and decrease off-site land application acreage from 314 acres to 230 acres. The facility is located on the south side of Farm-to-Market Road 8 approximately 2.0 miles east of the town of Lingleville in Erath County, Texas.

KMCO L.P. which operates KMCO, Port Arthur, Inc., an industrial organic chemical vacuum distillation facility, has applied for a renewal of TPDES Permit No. WQ0003544000, which authorizes the discharge of treated process wastewater, process area storm water, utility wastewater (non-contact cooling water, boiler blowdown, and firewater), and storm water (including storm water from diked tank farm areas) at a daily average dry weather flow not to exceed 100,000 gallons per day via Outfall 001. The facility is located at 2450 South Gulfway Drive, approximately five miles southwest of the Port Arthur City Hall in Jefferson County, Texas.

LAKE MUNICIPAL UTILITY DISTRICT has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0014478001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 240,000 gallons per day. The facility is located at 4454 1/2 Broadleaf Avenue, approximately 4,330 feet north of Interstate Highway 10 at

John Martin Road and approximately 2,800 feet east of the intersection of John Martin Road and Battle Bell Road in Harris County, Texas.

LUMINANT MINING COMPANY LLC which operates the Martin Lake and Oak Hill Lignite Mining Areas, has applied for a renewal of TPDES Permit No. WQ0002644000, which authorizes the discharge of mine water, groundwater seepage, and surface water runoff from the Oak Hill active mining areas to tributaries of Segment No. 0505 on an intermittent and flow variable basis via Outfall 001; surface water runoff from the Oak Hill post mining areas to tributaries of Segment No. 0505 on an intermittent and flow variable basis via Outfall 101; mine water, groundwater seepage, previously monitored effluent (PME's), and surface water runoff from the Oak Hill active mining areas to tributaries of Segment No. 0510 on an intermittent and flow variable basis via Outfall 002; surface water runoff from the Oak Hill post mining areas to tributaries of Segment No. 0510 on an intermittent and flow variable basis via Outfall 102; treated domestic effluent from the Oak Hill Mining Area sewage treatment plant at a daily average flow not to exceed 5,000 gallons per day via Outfall 202; mine water, groundwater seepage, previously monitored effluent (PME's), wastewater from coal combustion ash disposal sites associated with the Martin Lake Steam Electric station, and surface water runoff from the Martin Lake active mining areas to tributaries of Segment No. 0505 on an intermittent and flow variable basis via Outfall 003; surface water runoff from the Martin Lake post mining areas to tributaries of Segment No. 0505 on an intermittent and flow variable basis via Outfall 103; treated domestic effluent from the Tatum Mining Area sewage treatment plant at a daily average flow not to exceed 12,000 gallons per day via Outfall 203; treated domestic effluent from the Beckville Mining Area sewage treatment plant at a daily average flow not to exceed 18,000 gallons per day via Outfall 303; mine water, groundwater seepage, and surface water runoff from the Martin Lake active mining areas to tributaries of Martin Lake on an intermittent and flow variable basis via Outfall 004 and surface water runoff from the Martin Lake post mining areas to tributaries of Martin Lake on an intermittent and flow variable basis via Outfall 104. The Martin Lake Mining Area is located adjacent to, north, and east of Martin Lake in Panola County; the Oak Hill Mining Area is located approximately two miles north of the City of Henderson, Rusk County, Texas.

NATIONAL OILWELL VARCO L.P. has applied for a renewal of TPDES Permit No. WQ0012386001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 9,000 gallons per day. The facility is located approximately 1/4 mile south of the intersection of Old Beaumont Highway and Sheldon Road, on the east side of Sheldon Road in Harris County, Texas.

OAK MANOR MUNICIPAL UTILITY DISTRICT 95 has applied for a renewal of TPDES Permit No. WQ0010700001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 80,000 gallons per day. The facility is located approximately 2,000 feet northeast of the intersection of State Highway 35 and County Road 192 and 0.8 mile southwest of the intersection of State Highway 35 and Farm-to-Market Road 2917 in Brazoria County, Texas.

SHELL OIL COMPANY which operates the Deer Park Chemical Plant has applied for a major amendment to TPDES Permit No. WQ0000402000 to replace effluent limitations and monitoring requirements for fecal coliform bacteria with appropriate effluent limitations and/or monitoring requirements for enterococci bacteria. The current permit authorizes the discharge of treated process wastewater, treated domestic wastewater, utility wastewater, and storm water (diverted from Outfall 004) via Outfalls 001 and/or 101 on an intermittent and flow variable basis; storm water via Outfalls 002 and 003 on an intermittent and flow variable basis; and treated process wastewater, treated domestic wastewater, utility wastewater, and storm water via Outfall 004 at a daily average flow not to exceed 9,9,00,000 gallons per day. The facility is located at 5900 State Highway 225 in the City of Deer Park, Harris County, Texas.

VAM USA which proposes to operate the VAM USA WWTP, a pipe threading and coating facility, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004841000, to authorize the discharge of treated domestic and process wastewater at a daily average flow not to exceed 20,000 gallons per day via Outfall 001. The facility is located one mile southwest of the intersection of US 90 and Sheldon Road, Harris County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200802382
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 7, 2008

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Notice of Water Rights Applications

Notices issued April 30, 2008 through May 2, 2008.

APPLICATION NO. 14-2570A; Lower Colorado River Authority (LCRA), 3700 Lake Austin Blvd, Austin, Texas 78703 and Mills County State Bank, P.O. Box 309, Goldthwaite, Texas 76844, Applicants, have applied for an amendment to Certificate of Adjudication No. 14-2570 to add a downstream diversion point on the Colorado River, Colorado River Basin; to add municipal purposes of use to 276.71 acre-feet of water; to add authorization to impound and store the 276.71 acre-feet of water in Lometa Reservoir authorized by Water Use Permit No. 5715, for subsequent diversion and use; and to add a place of use being the service area of the Lometa Water System, which serves the City of Lometa and rural areas in the Lampasas, Mills, San Saba, and Burnet Counties. More information on the application and how to participate in the permitting process is given below. The application and a portion of the fees were received on May 4, 2007. Additional information and fees were received on July 6, 2007 and October 25, 2007. The application was accepted for filing and declared administratively complete on November 30, 2007. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 12261; Crown Oaks Property Owner's Association, 2204 Timberloch Place, Suite 180, Woodlands, TX 77380, Applicant, has applied for a Water Use Permit to modify and maintain a dam and reservoir on an unnamed tributary of Lake Creek, San Jacinto River Basin for in-place recreational purposes in Montgomery County. The reservoir will be kept at a constant level by use of an existing groundwater well. More information on the application and how to participate in the permitting process is given below. The application and fees was received on September 28, 2007. Additional information was received on November 26, 2007, January 14, 2008 and February 8, 2008. The application was declared administratively complete and filed with the Office of the Chief Clerk on February 8, 2008. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 12269; M.B.L.H. Marine, L.L.C., dba Vessel Repair, P.O. Box 965, Groves, Texas 77619, Applicant, has applied for a Water Use Permit to divert not to exceed 3.00 acre-feet of water from the Sabine-Neches Ship Channel, Neches-Trinity Coastal Basin, for industrial (hydro-testing) purposes in Jefferson County. More information on the application and how to participate in the permitting process is given below. The application and a portion of the fees were received on November 8, 2007. Additional information and fees were received on January 14 and February 14, 2008. The application was accepted for filing and declared administratively complete on April 4, 2008. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 05-4735A; Fellowship Church, 2450 North Highway 121, Grapevine, TX 76051, Applicant, has applied for an amendment to Certificate of Adjudication No. 05-4735 to construct and maintain a dam and reservoir on an unnamed tributary of Highland Pond Branch, Sabine River Basin for in-place recreational purposes in Wood County. More information on the application and how to participate in the permitting process is given below. The application and partial fees were received on February 5, 2008. Additional information and fees were received on March 5, March 12 and March 25, 2008. The application was declared administratively complete and accepted for filing on March 28, 2008. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "I/we request a contested case hearing"; and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200802383
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 7, 2008

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Texas Facilities Commission

Request for Proposals #303-8-11349

The Texas Facilities Commission (TFC), on behalf of the Texas Parks and Wildlife Department (TPWD), announces the issuance of Request for Proposals (RFP) #303-8-11349. TFC seeks a ten (10) year lease of approximately 3,664 square feet of office space in the Mesquite/Garland area of Dallas County, Texas.

The deadline for questions is May 23, 2008 and the deadline for proposals is May 30, 2008 at 3:00 p.m. The award date is July 23, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=76461*.

TRD-200802390
Kay Molina
General Counsel
Texas Facilities Commission
Filed: May 7, 2008

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Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission (HHSC) intends to submit an amendment to the Texas Home Living (TxHmL) waiver. TxHmL is a home and community-based services waiver program under the authority of §1915(c) of the Social Security Act. The proposed effective date of the waiver amendment is March 1, 2008.

The TxHmL program provides essential community-based services and supports to individuals with mental retardation living in their own homes or with their families. The current TxHmL waiver is approved from March 1, 2007, through February 29, 2012.

The TxHmL waiver program services include case management, adaptive aids, minor home modifications, audiology, speech therapy, occupational therapy, physical therapy, dietary services, behavioral supports, dental treatment, nursing, residential assistance, community support, respite, supported employment, and day habilitation. Day habilitation provides assistance with acquiring, retaining, or improving self-help, socialization, and adaptive skills necessary to reside successfully in home and community-based settings.

The amendment revises the methodology for establishing the rates for reimbursing the Consumer Directed Services Agencies (CDSA). The amendment also updates the rates based on the revised methodology. The CDSAs provide financial management services to consumers who choose to direct their own waiver services. The amendment maintains cost neutrality for each year remaining in the waiver period from 2008 to 2012.

To obtain copies of the proposed waiver amendment, interested parties may contact Carmen Samilpa-Hernandez by mail at Texas Health and Human Services Commission, P.O. Box 85200, H-620, Austin, Texas 78708-5200; by telephone at (512) 491-1128; by facsimile at (512) 491-1953; or by e-mail at carmen.samilpa-hernandez@hhsc.state.tx.us.

TRD-200802283
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 30, 2008

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Public Notice

The Texas Health and Human Services Commission (HHSC) intends to submit to the Centers for Medicare and Medicaid Services an amendment to the Community Living Assistance and Support Services (CLASS) Program. The CLASS Program is a Medicaid home and community-based services waiver program established under the authority of Title XIX, §1915(c) of the Social Security Act. The proposed effective date for the amendment is April 1, 2008.

The CLASS Program provides essential home and community-based services and supports to individuals living in their own or their families' homes who have mental retardation or severe chronic disabilities closely related to mental retardation.

Services include case management, adaptive aids and medical supplies, habilitation, minor home modifications, nursing services, occupational therapy, physical therapy, speech therapy, specialized therapies, behavioral support services, respite, and transition assistance.

This amendment is necessary to make CLASS waiver services available to eligible individuals in all counties in Texas.

HHSC is requesting that the waiver amendment be approved for the period beginning April 1, 2008, through August 31, 2009. This amendment maintains cost neutrality for waiver years 2008 through 2009.

To obtain copies of the proposed waiver amendment, interested parties may contact Carmen Samilpa-Hernandez by mail at Texas Health and Human Services Commission, P.O. Box 85200, mail code H-620, Austin, Texas 78708-5200, phone (512) 491-1128, fax (512) 491-1953, or by e-mail at carmen.samilpa-hernandez@hhsc.state.tx.us.

TRD-200802362
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: May 6, 2008

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Texas Department of Insurance

Company Licensing

Application to change the name of SCOR LIFE INSURANCE COMPANY to LONGEVITY ASSURANCE COMPANY, a domestic life, accident and/or health company. The home office is in Plano, Texas.

Application for admission to the State of Texas by PROGRESSIVE COMMERCIAL CASUALTY COMPANY, a foreign fire and/or casualty company. The home office is in Mayfield Village, Ohio.

Application to change the name of FINIAL INSURANCE COMPANY fka CONVERIUM INSURANCE (NORTH AMERICA) INC. to ALLIED WORLD REINSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in West Trenton, New Jersey.

Application for incorporation to the State of Texas by MILEMETER INSURANCE COMPANY, a domestic fire and/or casualty company. The home office is in Dallas, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200802393
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: May 7, 2008

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of THE 403(b) COMPANY, INC., a domestic third party administrator. The home office is DALLAS, TEXAS.

Application of US SCRIPT INC, a foreign third party administrator. The home offfice is WILMINGTON, DELAWARE.

Application to change the name of BENETRUST CORP. to BENETRUST CORP. (using the assumed name of ENVISAGE INSURANCE SERVICES), a domestic third party administrator. The home office is PLANO, TEXAS.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of David Moskowitz, MC 305-2E, 333 Guadalupe, Austin, Texas 78701.

TRD-200802407
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: May 7, 2008

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Texas Department of Insurance, Division of Workers' Compensation

Correction of Error

The Texas Department of Insurance, Division of Workers' Compensation proposed new rules, 28 TAC §§140.6 - 140.8, concerning Dispute Resolution--General Provisions, in the April 25, 2008, issue of the *Texas Register* (33 TexReg 3377). The web address that appears on page 3379, right column, fourth complete paragraph, is incorrect.

The paragraph should read as follows:

"To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on May 28, 2008. Comments may be submitted via the Internet through the Division's Internet website at http://www.tdi.state.tx.us/wc/rules/proposedrules/toc.html or by mailing or delivering your comments to Victoria Ortega, Legal Services, MS-4D, Division of Workers' Compensation, Texas Department of Insurance, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744."

TRD-200802394

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Texas Lottery Commission

Instant Game Number 1073 "WPT® Texas Hold 'Em® Poker"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1073 is "WPT® TEXAS HOLD 'EM® POKER". The play style is "poker".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1073 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1073.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: A SPADE SYMBOL, K SPADE SYMBOL, Q SPADE SYMBOL, J SPADE SYMBOL, 10 SPADE SYMBOL, 9 SPADE SYMBOL, 8 SPADE SYMBOL, 7 SPADE SYMBOL, 6 SPADE SYMBOL, 5 SPADE SYMBOL, 4 SPADE SYMBOL, 3 SPADE SYMBOL, 2 SPADE SYMBOL, A CLUB SYMBOL, K CLUB SYMBOL, Q CLUB SYMBOL, J CLUB SYMBOL, 10 CLUB SYMBOL, 9 CLUB SYMBOL, 8 CLUB SYMBOL, 7 CLUB SYMBOL, 6 CLUB SYMBOL, 5 CLUB SYMBOL, 4 CLUB SYMBOL, 3 CLUB SYMBOL, 2 CLUB SYMBOL, $5.00, $10.00, $15.00, $20.00, $50.00, $100, $1,000 and $50,000. The possible red play symbols are: A DIAMOND SYMBOL, K DIAMOND SYMBOL, Q DIAMOND SYMBOL, J DIAMOND SYMBOL, 10 DIAMOND SYMBOL, 9 DIAMOND SYMBOL, 8 DIAMOND SYMBOL, 7 DIAMOND SYMBOL, 6 DIAMOND SYMBOL, 5 DIAMOND SYMBOL, 4 DIAMOND SYMBOL, 3 DIAMOND SYMBOL, 2 DIAMOND SYMBOL, A HEART SYMBOL, K HEART SYMBOL, Q HEART SYMBOL, J HEART SYMBOL, 10 HEART SYMBOL, 9 HEART SYMBOL, 8 HEART SYMBOL, 7 HEART SYMBOL, 6 HEART SYMBOL, 5 HEART SYMBOL, 4 HEART SYMBOL, 3 HEART SYMBOL and 2 HEART SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1073 - 1.2D

PLAY SYMBOL	CAPTION
A SPADE SYMBOL (black)	
K SPADE SYMBOL (black)	
Q SPADE SYMBOL (black)	
J SPADE SYMBOL (black)	
10 SPADE SYMBOL (black)	
9 SPADE SYMBOL (black)	
8 SPADE SYMBOL (black)	
7 SPADE SYMBOL (black)	
6 SPADE SYMBOL (black)	
5 SPADE SYMBOL (black)	
4 SPADE SYMBOL (black)	
3 SPADE SYMBOL (black)	
2 SPADE SYMBOL (black)	
A CLUB SYMBOL (black)	
K CLUB SYMBOL (black)	
Q CLUB SYMBOL (black)	
J CLUB SYMBOL (black)	
10 CLUB SYMBOL (black)	
9 CLUB SYMBOL (black)	
8 CLUB SYMBOL (black)	
7 CLUB SYMBOL (black)	
6 CLUB SYMBOL (black)	
5 CLUB SYMBOL (black)	
4 CLUB SYMBOL (black)	
3 CLUB SYMBOL (black)	
2 CLUB SYMBOL (black)	
A DIAMOND SYMBOL (red)	
K DIAMOND SYMBOL (red)	
Q DIAMOND SYMBOL (red)	
J DIAMOND SYMBOL (red)	
10 DIAMOND SYMBOL (red)	
9 DIAMOND SYMBOL (red)	
8 DIAMOND SYMBOL (red)	
7 DIAMOND SYMBOL (red)	
6 DIAMOND SYMBOL (red)	
5 DIAMOND SYMBOL (red)	
4 DIAMOND SYMBOL (red)	
3 DIAMOND SYMBOL (red)	
2 DIAMOND SYMBOL (red)	
A HEART SYMBOL (red)	
K HEART SYMBOL (red)	
Q HEART SYMBOL (red)	
J HEART SYMBOL (red)	
10 HEART SYMBOL (red)	
9 HEART SYMBOL (red)	
8 HEART SYMBOL (red)	

7 HEART SYMBOL (red)	
6 HEART SYMBOL (red)	
5 HEART SYMBOL (red)	
4 HEART SYMBOL (red)	
3 HEART SYMBOL (red)	
2 HEART SYMBOL (red)	
$5.00 (black)	FIVE$
$10.00 (black)	TEN$
$15.00 (black)	FIFTN
$20.00 (black)	TWENTY
$50.00 (black)	FIFTY
$100 (black)	ONE HUND
$1,000 (black)	ONE THOU
$50,000 (black)	50 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1073), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 75 within each pack. The format will be: 1073-0000001-001.

K. Pack - A pack of "WPT® TEXAS HOLD 'EM® POKER" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "WPT® TEXAS HOLD 'EM® POKER" Instant Game No. 1073 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "WPT® TEXAS HOLD 'EM® POKER" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) Play Symbols. A player must use the 2 cards for each PLAYER and the COMMUNITY CARDS to make the best 5-card poker hand. The player must do the same with the CHAMPION hand. If any PLAYER's best 5-card poker hand beats the CHAMPION's best 5-card poker hand, the player wins the PRIZE shown for that PLAYER. Each ticket uses one 52-card deck. There are no Wild Cards in this game. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 (twenty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 (twenty-two) Play Symbols under the latex overprint on the front

portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 22 (twenty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Listed below is a Glossary of Terms for use in the patterns to follow:

"Starting Hand" - The two (2) cards underneath the scratch-off coating marked "PLAYER 1" through "PLAYER 5" or underneath the Scratch-off coating marked "CHAMPION".

"Board" - The five (5) cards underneath the scratch-off coating marked "COMMUNITY CARDS".

"Suit" - The Spades, Hearts, Diamonds and Clubs are the four (4) Suits.

"Suited" - Any amount of cards where each card is of the same Suit (for example, 4 of Hearts + 5 of Hearts).

"Non-suited" - Any amount of cards where at least one is of a different suit (for example, 4 of Hearts + 5 of Spades).

"Sequential" - Any amount of cards that are connected (for example, 10 of Hearts; Jack of Hearts; Queen of Diamonds; King of Clubs; Ace of Spades).

"Non-Sequential" - Any amount of cards that are not connected (for example, Ace of Hearts + Queen of Diamonds).

"Pair" - Two (2) cards of the exact same rank (for example, Ace of Diamonds + Ace of Spades or 7 of Hearts + 7 of Clubs).

"Three of a Kind" - Three (3) cards of the exact same rank.

"Straight" - Five (5) non-suited cards in sequential order (for example, 2 of Clubs; 3 of Hearts; 4 of Diamonds; 5 of Spades; 6 of Diamonds).

"Flush" - Five (5) non-sequential cards of the same suit (for example, 2 of Diamonds; 4 of Diamonds; 5 of Diamonds; Jack of Diamonds; King of Diamonds).

"Full House" - Three (3) of a kind with a pair (for example, 4 of Diamonds; 4 of Clubs; 4 of Spades; 9 of Hearts; 9 of Diamonds).

"Four of a Kind" - Four (4) cards of the exact same rank.

"Straight Flush" - Five (5) suited and sequential cards, EXCEPT the highest five (5) sequential cards.

"Royal Flush" - The highest five (5) suited and sequential cards (for example, 10 of Diamonds; Jack of Diamonds; Queen of Diamonds; King of Diamonds; Ace of Diamonds).

"Final Hand" - The highest ranking five-card hand that uses the two (2) cards in either STARTING HAND with the five (5) cards on the Board.

B. Consecutive non-winning tickets in a pack will not have identical play data, spot for spot.

C. No duplicate non-winning prize symbols on a ticket.

D. Non-winning prize symbols will never be the same as a winning prize symbol(s).

E. A ticket may only win once in each table for a total of five possible wins on a ticket.

F. The $1,000 and $50,000 prize symbols will appear at least once on every ticket unless otherwise restricted by the prize structure.

G. Tickets can win up to five (5) times on a ticket in accordance with the approved prize structure.

H. There will be no duplicate card play symbols on a ticket.

I. No PLAYERS 1 through 5 hand will ever tie the CHAMPION'S hand.

J. On winning hands when the CHAMPION'S hand is equal to 1 pair, all winning PLAYERS 1 through 5 must have a value of a greater 1 Pair, or higher.

K. On winning hands when CHAMPION'S hand is equal to 2 Pair, all winning PLAYERS 1 through 5 must have a value of 3 of a Kind or higher.

L. On winning hands when CHAMPION'S hand is equal to 3 of a Kind, all winning PLAYERS 1 through 5 must have a value of Straight or higher.

M. On winning hands when CHAMPION'S hand is equal to Straight, all winning PLAYERS 1 through 5 must have a value of Flush or higher.

N. On winning hands when CHAMPION'S hand is equal to Flush, all winning PLAYERS 1 through 5 must have a value of Full House or higher.

O. On winning hands when CHAMPION'S hand is equal to Full House, all winning PLAYERS 1 through 5 must have a value of 4 of a Kind or higher.

P. On non-winning hands when CHAMPION'S hand is equal to Full House, all losing PLAYERS 1 through 5 must have a value of Flush or lower.

Q. On non-winning hands when CHAMPION'S hand is equal to Flush, all losing PLAYERS 1 through 5 must have a value of Straight or lower

R. On non-winning hands when CHAMPION'S hand is equal to Straight, all losing PLAYERS 1 through 5 must have a value of 3 of a Kind or lower.

S. On non-winning hands when CHAMPION'S hand is equal to 3 of a Kind, all losing PLAYERS 1 through 5 must have a value of 2 Pair or lower.

T. On non-winning hands when CHAMPION'S hand is equal to 2 Pair, all losing PLAYERS 1 through 5 must have a value of 1 Pair, or lower.

U. On non-winning hands when CHAMPION'S hand is equal to 1 Pair, all losing PLAYERS 1 through 5 must have a value less than 1 Pair, or lower.

V. No CHAMPION'S hand will be higher than a Full House.

W. No CHAMPION'S hand will contain any combination of A, 2, 3, 4 and 5.

X. No PLAYERS 1 through 5 when used in combination with the COMMUNITY CARDS within a single hand will contain any combination of A, 2, 3, 4 and 5.

Y. Each and every Starting Hand (PLAYER 1 through PLAYER 5 or CHAMPION'S hand) will come from one of the following groups:

1. Any Pair

2. Any Suited and Sequential two (2) cards

3. Any Non-Suited and Sequential or any Non-Suited and Non-Sequential Cards where BOTH cards are either a 10, Jack, Queen, King or Ace

Z. If any of the six Starting Hands contain two suited cards, then NONE of the other five Starting Hands will contain two suited cards from that EXACT SAME suit. (For example, PLAYER 1 play symbols are Queen of Diamonds + Jack of Diamonds, then CHAMPION'S hand play symbols will never be Ace of Diamonds + King of Diamonds. However, CHAMPION'S hand play symbols could be Ace of Clubs + Queen of Hearts).

AA. No two of the six Starting Hands will ever be of the same rank. (For example Jack of Hearts + 10 of Hearts vs. Jack of Diamonds + 10 of clubs + 4 of Diamonds vs. 4 of Hearts + 4 of Spades).

BB. The 5 COMMUNITY CARDS will never create a Straight, Flush, Full House, Four of a Kind, Straight Flush or Royal Flush.

CC. The 5 COMMUNITY CARDS will never contain four cards of the same suit.

DD. Every Straight or Straight Flush will use the card ranks below. An Ace will never be used in a Straight or Straight Flush. 2, 3, 4, 5, 6 3, 4, 5, 6, 7 4, 5, 6, 7, 8, 5, 6, 7, 8, 9 6, 7, 8, 9, 10 7, 8, 9, 10 Jack 8, 9, 10, Jack, Queen 9, 10, Jack, Queen, King

EE. A CHAMPION'S hand will never be a straight if any PLAYER 1 through 5 hand contains a Straight Flush or Royal Flush.

FF. Any winning hand above and including a Full House will win $100 or more.

2.3 Procedure for Claiming Prizes.

A. To claim a "WPT® TEXAS HOLD 'EM® POKER" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "WPT® TEXAS HOLD 'EM® POKER" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "WPT® TEXAS HOLD 'EM® POKER" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "WPT® TEXAS HOLD 'EM® POKER" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "WPT® TEXAS HOLD 'EM® POKER" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 7,080,000 tickets in the Instant Game No. 1073. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1073 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	849,600	8.33
$10	566,400	12.50
$15	165,200	42.86
$20	94,400	75.00
$50	112,100	63.16
$100	17,700	400.00
$1,000	80	88,500.00
$5,000	50	141,600.00
$50,000	10	708,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.92. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1073 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1073, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200802359

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: May 5, 2008

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Texas Department of Public Safety

Request for Qualifications - Agreement for Internal Audit and Risk Assessment Services

PURPOSE

The Texas Department of Public Safety (TXDPS or Department) is seeking to enter into a contract, under which highly qualified auditors

will provide governmental auditing, accounting expertise and risk assessment services for fiscal years 2008 through 2009. The successful vendor will work with the Director of Audit and Inspection (Director or Project Manager) to do the following: a) complete certain internal audit projects; b) evaluate and contribute to the improvement of risk management and control processes within the Department; and c) provide internal auditing services to include risk assessments, informal and formal advice, analysis, or assessments of Department business processes, governance processes, and related controls.

BACKGROUND

The Office of Audit and Inspection plans and conducts internal audits appraising the effectiveness, efficiency, and reliability of the Department's administrative, information technology, and accounting systems and controls. Due to staff retention issues in recent years, the fiscal year 2008 Internal Audit Plan cannot be completed without outsourced assistance. Furthermore, the function would benefit from ongoing outsourced support in fiscal year 2009 as the Office of Audit and Inspection continues to provide the Department with internal auditing services. The Department is a dynamic organization that manages ever increasing challenges to its limited resources in the accomplishment of its operating objectives. It is imperative that the Department takes every opportunity to ensure its processes are as effective and efficient as possible. A vendor is needed to provide auditing services on a broad range of operational/financial topics relative to the Department's business processes, governance processes, and related controls.

In addition, the Department seeks an independent risk assessment of all Department programs and related auditable units. The purpose of such an assessment will be to develop the Department's annual internal audit plan.

REQUIREMENTS

The selected vendor must comply with the requirements of Chapter 2102 of the Government Code (Internal Auditing) and §§411.241 - 411.243 of the Government Code.

TXDPS is seeking highly qualified auditors to:

1. Complete approximately 800 hours of internal audit work planned for fiscal year 2008, on or before September 15, 2008. The initial objectives for this work have been established by the Director, as follows:

a. **Capital Asset Accounting** - Are the processes used to account for capital assets working as designed and providing reliable information about the location and value of Department capital assets?

b. **Criminal Law Enforcement Reporting and Information System ("CLERIS") Management** - Is the management of access, reliability of data, and security of this database adequate?

c. **Texas Law Enforcement Telecommunications System ("TLETS") Transition Project** - Was this project managed in compliance with Department contract management policies/procedures?

d. **TXDPS Information Management Service ("IMS") Training** - Is IMS personnel training being targeted to address the needs of the Department?

e. **Satellite Contract** - Evaluate the quality of the contract, its management, and determine whether deliverables contracted for were received.

f. **TXDPS Central Cash Receiving - IT Resources & Applications Control** - Are the IT resources in Central Cash Receiving adequate and supported by vendors? Evaluate the applications controls of programs used in Central Cash Receiving.

g. **IMS Programming Standards** - Are IMS programming standards adequate? Prepare a gap analysis between Department standards and best practices.

h. **Vehicle Inspection Records** - perform risk assessment of this area and perform internal audit accordingly.

The vendor will be expected to keep the Director appropriately informed as the project proceeds and complete the following:

* A preliminary assessment of the risks relevant to the activity to be audited

* A refinement of the initial audit objectives based on the risk assessment

* Establish the scope of the audit project

* An audit program to complete the project

* Conduct the audit by identifying, analyzing, evaluating, and recording sufficient reliable information to support conclusions reached

* Write a report on the audit findings to include a background section and an audit results section, including any audit recommendations developed and a section that concisely states the audit objective(s), audit scope, and the audit methodologies used to complete the project.

The Director will present the report to TXDPS management and solicit their responses to any audit recommendations developed.

2. Complete a risk assessment for internal audit planning purposes, to include all Department programs and their auditable units. The assessment is to be completed on or before September 16, 2008, and delivered to the Director no later than September 26, 2008. At the Department's discretion, the Department may also request another risk assessment in fiscal year 2009 to be conducted in May and June of 2009, to be completed and delivered to the Director by July 1, 2009.

3. Upon request, provide internal auditing services to include the following in accordance with Chapter 2102 of the Government Code (Internal Auditing) and §§411.241 - 411.243 of the Government Code:

(A) ensure that operations are conducted efficiently, uniformly, and in compliance with established procedures;

(B) make recommendations for improvements in operational performance;

(C) promote economy, effectiveness, and efficiency within the department;

(D) prevent and detect fraud, waste, and abuse in department programs and operations;

(E) make recommendations about the adequacy and effectiveness of the department's system of internal control policies and procedures;

(F) advise in the development and evaluation of the department's performance measures;

(G) review actions taken by the department to improve program performance and make recommendations for improvement;

(H) review and make recommendations to TXDPS, so TXDPS can make recommendations to the Public Safety Commission and the legislature regarding rules, laws, and guidelines relating to department programs and operations;

(I) keep TXDPS fully informed of problems in department programs and operations, so TXDPS can inform the Public Safety Commission, the TXDPS director, and the legislature;

(J) coordinate with the TXDPS Project Manager so TXDPS can ensure effective coordination and cooperation among the State Auditor's Of-

fice, legislative oversight committees, and other governmental bodies while attempting to avoid duplication; and

(K) any other auditing services authorized by Chapter 2102 of the Government Code, including, but not limited to, assurance services, financial audits, compliance audits, economy and efficiency audits, effectiveness audits and investigations.

PROCUREMENT PROCESS

Schedule

The anticipated schedule of events pertaining to this RFQ is as follows:

Posting of the RFQ on the Electronic State Business Daily (ESBD) - May 7, 2008

Texas Register Posting - May 16, 2008

Questions due - May 27, 2008

Official Responses to Questions posted - May 30, 2008

Responses due - June 6, 2008

Contract Execution - June 16, 2008, or as soon thereafter as practical

Inquiries and other Correspondence

Questions concerning this RFQ must be directed **in writing only via e-mail** to the appropriate TXDPS Point of Contact. Questions regarding the RFQ must clearly identify which section and paragraph of the RFQ is being referenced. Questions received after **May 27, 2008** at 3:00 p.m. will not be answered. Verbal inquiries are not acceptable and will receive no response.

Responses to Inquiries and Addenda

Questions and answers from this RFQ will be posted on the Texas Marketplace, Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/ as time permits, but no later than **May 30, 2008** at 5:00 p.m. When contacting the ESBD, Respondents must search under RFQ #405-HQ8-9080.

TXDPS reserves the right in its sole discretion to amend this RFQ to clarify, revise, supplement or delete any provision or to add new provisions. In the event that a revision of the RFQ becomes necessary, addenda will be posted on the Texas Marketplace, Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/. It is the responsibility of Respondents to check this site frequently for amendments and/or addenda to the RFQ.

In the event of a conflict between this notice and the posting on the ESBD, the posting on the ESBD controls.

TXDPS Point of Contact

Any parties interested in obtaining a complete copy of this RFQ should go to the Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/ and download it or contact the TXDPS Point of Contact below. Any correspondence regarding procurement issues (including cost, responses, etc.) for this RFQ prior to the award of any contract shall be made to the TXDPS Point of Contact below in writing only via e-mail. Specify "RFQ #405-HQ8-9080" in the subject.

TXDPS Point of Contact: Ray Miller, CTPM, Purchaser IV

TEXAS DEPARTMENT OF PUBLIC SAFETY

Accounting & Budget Control - Purchasing

5805 North Lamar Blvd., MSC 0130

Austin, Texas 78752

Phone: (512) 424-2205

Fax: (512) 424-2546

E-mail: ray.miller@txdps.state.tx.us

Evaluation Criteria and Scoring

TXDPS will comply with §2254.027 of the Texas Government Code regarding the selection of a consultant. Responses will be evaluated under the evaluation criteria outlined in the complete RFQ posted on the Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/. TXDPS reserves the right to accept or reject any or all proposals submitted. TXDPS is not obligated to execute a contract on the basis of this notice or the distribution of any RFQ. TXDPS shall not pay for any costs incurred by any entity in responding to this Notice or the RFQ.

TRD-200802388
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Filed: May 7, 2008

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Request for Qualifications - Study the Management and Organizational Structure of the Texas Department of Public Safety

PURPOSE

The Texas Department of Public Safety (TXDPS or Department or DPS) is seeking an independent, top-down study of the Department to optimize performance, improve quality, promote the effective and efficient use of resources, and assist in the identification of future resource needs.

BACKGROUND

The Department was formed on August 10, 1935, when the Texas Legislature moved the Texas Ranger Force from the Adjutant General's Office and the Texas Highway Motor Patrol from the Highway Department to form the Texas Department of Public Safety. Control of the Department was vested in a three member Public Safety Commission. Since that time, numerous changes have been made to the organization and structure of the Department.

1937 - The Legislature gives TXDPS responsibility for licensing drivers and creates the Narcotics Section.

1951 - The Legislature gives TXDPS responsibility for enforcing the Motor Vehicle Inspection Act.

1957 - Based on an extensive study by the Texas Research League, the Legislature authorized a reorganization of the Department, dividing the state into six regional commands. The divisions at Headquarters were consolidated into four divisions in support of local law enforcement and the regional commands.

1963 - The Governor transferred the State Civil Defense Office from his office to TXDPS and designated the TXDPS Director as its head.

1967 - The Data Processing Division was formed by the Department.

1968 - The Department formed the Criminal Law Enforcement (CLE) and Traffic law Enforcement (TLE) Divisions.

1972 - The Motor Vehicle Theft Service was added to CLE.

1973 - The Department formed the Administration Division.

1978 - The Internal Affairs Unit was organized.

1980 - The Internal Audit function was established.

1983 - The Criminal Analysis Section was consolidated with the Criminal Intelligence Service.

1991 - The Capitol Police Force was transferred to the Department.

1993 - The Legislature created a separate Ranger Division.

1998 - The Department formed a separate Driver License Division.

2003 - The TLE Division reorganized, changed its name to the Texas Highway Patrol Division and increased the number of regional commands to eight.

2004 - The Texas Commission on Private Security became part of the Department.

2004 - The Governor, by Executive Order, designated the Director of the State Office of Homeland Security as Director of the Governor's Division of Emergency Management, replacing the TXDPS Director as its head.

2007 - The Bureau of Information Analysis was formed by consolidating the crime analyst functions from the various divisions.

At full strength, TXDPS employs 8,437 personnel with an annual budget of approximately $851 million. This includes 3,816 commissioned officers and 4,621 non-commissioned employees assigned to various duty stations throughout the state and Headquarters.

The Department is structurally organized into functional program areas reflecting enforcement priorities and required licensing and regulatory functions. There are six major divisions: Texas Highway Patrol, Driver License, Texas Rangers, Criminal Law Enforcement, Administration, and the Emergency Management. In addition, the Director's Staff is comprised of Accounting and Budget Control, Aircraft, Office of Audit and Inspection, Information Management Service (IMS), Employee Relations, Media Relations, Office of General Counsel, and Legislative Liaison. The Department is controlled by a five member Public Safety Commission appointed by the Governor.

In the 21st century, law enforcement agencies must be able to adequately address the traditional roles of suppressing crime, keeping the peace, ensuring safety and providing service; while at the same time, fulfilling new anti-terrorism responsibilities. Information technology has an impact on all Department functions. Constant change, disparate systems and resource limitations make it difficult for IMS to keep pace with demands. Law enforcement nationwide took on an expanded role on September 11, 2001. The Department must utilize actionable intelligence in a proactive, coordinated fashion to disrupt criminal organizations and prevent acts of terrorism. Considering a rapidly changing operating climate, the Department seeks to ensure the proper structure, resource allocation and workforce is in place to ensure operational efficiency and effectiveness. Therefore, the Public Safety Commission (PSC) has directed that a comprehensive, outside consultant study be conducted of the Department to ensure a proper management framework exists to fulfill the mission and objectives. PSC does not want change for change's sake, but rather recommendations that will actually improve the Department's ability to provide public safety in the State of Texas, today and into the future.

REQUIREMENTS

TXDPS is seeking a contractor to study the organizational structure, operation, resource allocation and workforce utilization of the Department.

The contractor, at a minimum, must:

1. Analyze the Department's current organizational structure, regional boundaries, supervision, division of labor, degree of specialization, decision-making authority, span of control, internal communication between functions, accountability, controls, degree of centralization, functional differentiation, vertical differentiation, spatial differentiation, discretion, direction, staffing levels, leadership and communications, goal setting, planning, staff allocation process, resource allocation, and development of human capital;

2. Conduct an environmental scan of the current state of public safety agency management in the United States and identify trends, issues and topics that may affect future DPS missions;

3. Conduct a best practices analysis of law enforcement/homeland security/emergency management operations and structure, assessing the relevancy to DPS and the implications for implementation and adoption; and

4. Conduct a mission effectiveness analysis, based on industry practice, for each major function of the Department.

The contractor's final report must, at a minimum, include:

1. All methodologies used to conduct the study, documentation of all sources of information, and all relevant findings;

2. All needed recommendations for improvement, including but not limited to:

a. The best organizational structure to ensure accomplishment of the DPS mission;

b. The best means to ensure effective and efficient operations;

c. The best methods to eliminate barriers to effective operations;

d. The best means to promote collaboration and teamwork;

e. The best strategies for managing issues across functional areas of responsibility;

f. The validity of currently identified core and enterprise support processes;

g. The best means to leverage scarce resources;

h. The gap analysis between the current state of DPS and the findings of the best practice analysis with recommendations to fill those specific gaps;

i. Other recommendations needed to improve quality, promote the effective and efficient use of resources, and ensure mission accomplishment;

3. A comprehensive implementation plan for any change resulting from the report's recommendations by providing a schedule with a timeline for each recommendation and a resource plan for the implementation. Change management and communication plans must be incorporated into this implementation plan. The plan must also consider and address any impediments to implementing the recommendations, measures to address such impediments, and alternative recommendations in case such impediments cannot be overcome;

4. Resources required and cost impacts associated with any recommendations; and

5. Specific means to evaluate the effectiveness of recommendations that may be implemented.

The selected Respondent must submit a draft of the final written report to the TXDPS Project Manager no later than 3:00 p.m. on September 1, 2008. Upon request, the selected Respondent must correct any errors due to incorrect information.

The selected Respondent must submit the final, original written report to the TXDPS Project Manager no later than 3:00 p.m. on September

11, 2008. The selected Respondent must deliver to the TXDPS Project Manager fourteen (14) printed copies of the final report and one (1) electronic version in a form approved by the TXDPS Project Manager no later than 3:00 p.m. on September 11, 2008.

The selected Respondent is required to make a formal presentation of the final report to the Public Safety Commission at the Public Safety Commission's monthly meeting in September, 2008, or at the next monthly meeting if the September meeting is cancelled. The selected Respondent must also answer any questions posed by the Chairman, any member of the Public Safety Commission or any person in attendance at the meeting during the formal presentation.

TXDPS reserves the right to change the deadlines listed herein.

PROCUREMENT PROCESS

This proposed procurement is contingent on a delegation of authority from the State Auditor's Office and a Finding of Fact from the Governor's Office.

Schedule

The anticipated schedule of events pertaining to this RFQ is as follows:

Posting of the RFQ on the Electronic State Business Daily (ESBD) - May 7, 2008

Texas Register Posting - May 16, 2008

Questions due - May 27, 2008

Official Responses to Questions posted - May 30, 2008

Responses due - June 6, 2008

Contract Execution - June 16, 2008, or as soon thereafter as practical

Inquiries and other Correspondence

Questions concerning this RFQ must be directed **in writing only via e-mail** to the appropriate TXDPS Point of Contact. Questions regarding the RFQ must clearly identify which section and paragraph of the RFQ is being referenced. Questions received after **May 27, 2008** at 3:00 p.m. will not be answered. Verbal inquiries are not acceptable and will receive no response. Responses to Inquiries and Addenda

Questions and answers from this RFQ will be posted on the Texas Marketplace, Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/ as time permits, but no later than **May 30, 2008** at 5:00 p.m. When contacting the ESBD, Respondents must search under RFQ #405-HQ8-9081.

TXDPS reserves the right in its sole discretion to amend this RFQ to clarify, revise, supplement or delete any provision or to add new provisions. In the event that a revision of the RFQ becomes necessary, addenda will be posted on the Texas Marketplace, Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/. It is the responsibility of Respondents to check this site frequently for amendments and/or addenda to the RFQ.

In the event of a conflict between this notice and the posting on the ESBD, the posting on the ESBD controls.

TXDPS Point of Contact

Any parties interested in obtaining a complete copy of this RFQ should go to the Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/ and download it or contact the TXDPS Point of Contact below. Any correspondence regarding procurement issues (including cost, responses, etc.) for this RFQ prior to the award of any contract shall be made to the TXDPS Point of Contact below in writing only via e-mail. Specify "RFQ #405-HQ8-9081" in the subject.

TXDPS Point of Contact: Ray Miller, CTPM, Purchaser IV

TEXAS DEPARTMENT OF PUBLIC SAFETY

Accounting & Budget Control - Purchasing

5805 North Lamar Blvd., MSC 0130

Austin, Texas 78752

Phone: (512) 424-2205

Fax: (512) 424-2546

E-mail: ray.miller@txdps.state.tx.us

Evaluation Criteria and Scoring

TXDPS will comply with §2254.027 of the Texas Government Code regarding the selection of a consultant. Responses will be evaluated under the evaluation criteria outlined in the complete RFQ posted on the Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/. TXDPS reserves the right to accept or reject any or all proposals submitted. TXDPS is not obligated to execute a contract on the basis of this notice or the distribution of any RFQ. TXDPS shall not pay for any costs incurred by any entity in responding to this Notice or the RFQ.

TRD-200802392
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Filed: May 7, 2008

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Public Utility Commission of Texas

Consulting or Testifying Expert Witness Services Concerning Abuse of Market Power

RFP No. 473-08-00260, Project No. 35643

The Public Utility Commission of Texas (PUCT or Commission) is issuing a Request for Proposals (RFP) for a person or entity to provide consulting and/or testifying expert services in connection with a contested case concerning abuse of market power.

The PUCT is responsible for monitoring market power associated with the generation and sale of electricity in Texas. Texas Utilities Code §39.157(a). The PUCT is assisted by a wholesale electric market monitor, known as the Independent Market Monitor (IMM). Texas Utilities Code §39.1515.

In 2006, the IMM conducted an investigation into the bidding behavior of Luminant, the power generation subsidiary of Energy Future Holdings (formerly TXU Corp.) during the summer of 2005. The IMM concluded that Luminant's behavior constituted an abuse of market power and increased balancing energy prices by an average of 15.5%. As a result, on March 28, 2007, the Commission's Executive Director filed a Notice of Violation (NOV) recommending the assessment of administrative penalties against the company. The company filed a motion for a contested case hearing the next day.

The Commission contemplates that the successful proposer will assist Commission staff by performing some or all of the following services: reviewing discovery material; evaluating testimony by Luminant; consulting with Staff's experts; preparing responsive testimony; appearing at a hearing to defend the testimony; and assisting with the preparation of post-hearing briefs.

The proposal submission deadline is 5:00 p.m., Friday, June 6, 2008.

The complete RFP is on the PUC website at:

http://www.puc.state.tx.us/about/procurement/currentrfps.cfm

To obtain a copy of the RFP, contact Cindy Wilson, Purchaser at (512) 936-7069; or cindy.wilson@puc.state.tx.us; or PUCT, P.O. Box 13326, Austin, TX 78702-3326.

TRD-200802376
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 6, 2008

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Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on May 1, 2008, with the Public Utility Commission of Texas (commission) for an amendment to a certificated service area boundary in Collin County, Texas.

Docket Style and Number: Application of AT&T Texas to Amend a Certificate of Convenience and Necessity for a Minor Boundary Amendment Between the Frisco Exchange (AT&T) and the Plano Exchange (Verizon). Docket Number 35624.

The Application: The minor boundary amendment will realign the boundary between the Frisco exchange of AT&T Texas and the Plano exchange of Verizon to allow AT&T Texas to provide local exchange telecommunications services to the new Normandy Estates subdivision. This amendment will transfer a small portion of territory from Verizon to AT&T Texas to provide service to an area where Verizon does not have facilities.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by May 23, 2008, by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 35624.

TRD-200802387
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 7, 2008

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Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of a joint application for sale, transfer, or merger filed with the Public Utility Commission of Texas on April 29, 2008, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.101 and §37.154 (Vernon 2007) (PURA).

Docket Style and Number: Joint Application of AEP Texas Central Company and LCRA Transmission Services Corporation to Transfer Certificate Rights and for Approval of Transfer of Facilities in Hidalgo, Nueces, and Maverick Counties, Docket Number 35613.

The Application: This transaction involves the transfer from AEP Texas Central Company to LCRA Transmission Services Corporation, transmission facilities and associated certificate of convenience and necessity rights. The transmission facilities proposed for transfer are: (1) an approximate 2.7-mile portion of the 69-kV transmission facilities located on the Flato Partner's Property along the North Padre Island Tap-to-Port Aransas Substation transmission line located in Nueces, County; (2) the Laguna Substation-to-Naval Base Substation 69-kV transmission facility located in Nueces County; (3) the Pueblo Substation-to-Pueblo Tap 138-kV transmission facility located in Maverick County; and (4) the Bates-to-Goodwin Substation 138-kV located in Hidalgo County.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 35613.

TRD-200802286
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 30, 2008

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Request for Comments - Rulemaking to Update Substantive Rule §25.93 for the Nodal Market Transactions and Associated Filing Software

The staff of the Public Utility Commission of Texas (PUC or commission) has initiated Project Number 35444, *Rulemaking to Update Subst. R. §25.93 for the Nodal Market Transactions and Associated Filing*. PUC Substantive Rule §25.93 requires any person, municipally owned utility, electric cooperative and river authority that owns electric generation facilities and offers electricity for sale in this state as well as power marketers as defined in PUC Substantive Rule §25.5, relating to Definitions, to submit all wholesale transactions for the sale of electricity that begin or terminate in Texas, or occur entirely within Texas, including areas of the state not served by the Electric Reliability Council of Texas (ERCOT).

The commission will make available for comment the Draft Instructions, Form, and questions in the PUC Agency Information System (AIS) under Project Number 35444 on Friday, May 9, 2008. Parties are requested to provide comments by Friday, June 6, 2008.

Written comments concerning this project may be filed by submitting 4 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. All comments should reference Project Number 35444.

Questions concerning Project Number 35444 should be referred to Tony Grasso, Market Economist, Wholesale Markets Section of the Competitive Markets Division, (512) 936-7385. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200802406
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 7, 2008

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The Texas A&M University System

Notice of Sale of Oil, Gas, and Sulphur Lease

The Board of Regents of The Texas A&M University System, pursuant to provisions of Vernon's Texas Code Annotated (V.T.C.A.), Education Code, Chapter 85, as amended, and subject to all policies and regu-

lations promulgated by the Board of Regents, offers for sale at public auction in Suite 2079, System Real Estate Office, The Texas A&M University System, A&M System Building, 200 Technology Way, College Station, Texas, at 10:00 a.m., Wednesday, June 11, 2008, an oil, gas and sulphur lease on the following described land in Newton County, Texas. The property offered for lease contains 711.50 mineral acres, more or less, and more particularly described as follows:

711.50 acres of land, more or less, out of the John T. Lewis Survey A-264, Newton County, Texas

The minimum lease terms, which apply to this tract, are as follows:

(1) Bonus: Market rate, but in no event will it be less than $400 per net mineral acre

(2) Royalty: 25%

(3) Primary term: Three (3) years

(4) Net Mineral Acres: 711.50 (More or Less)

Highest bidder shall pay to the Board of Regents on the day of the sale 25% of the bonus bid, and the balance of the bid shall be paid to the Board within twenty-four (24) hours after notification that the bid has been accepted. All payments shall be by cash, certified check or cashier's check as the Board may direct. Failure to pay the balance of the amount bid will result in forfeiture to the Board of the 25% paid. The Board of Regents of The Texas A&M University System **RESERVES THE RIGHT TO REJECT ANY AND ALL BIDS**. The successful bidder will be required to pay all advertising expenses and administrative costs.

Further inquiries concerning oil, gas and sulphur leases on System land should be directed to:

Melody Meyer

System Real Estate Office

The Texas A&M University System

200 Technology Way, Suite 2079

College Station, Texas 77845-3424

(979) 458-6350

TRD-200802408
Vickie Burt Spillers
Executive Secretary to the Board of Regents
The Texas A&M University System
Filed: May 7, 2008

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Architectural/Engineering Services

The City of Center, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below:

Airport Sponsor: City of Center, Center Municipal Airport. TxDOT CSJ No.08HGCENTR. Scope: Provide engineering/design services for site development and associated utilities and appurtenances for a 10-unit pre-engineered metal aircraft hangar building system with hangar access paving at the Center Municipal Airport.

There is no DBE goal for this project. TxDOT Project Manager is John Wepryk.

To assist in your proposal preparation the criteria, 5010 drawing and most recent airport layout plan are available online at **www.txdot.gov/avn/avninfo/notice/consult/index.htm** by selecting "Center Municipal Airport."

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at **www.txdot.gov/services/aviation/consultant.htm**. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than June 6, 2008, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Edie Stimach.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each.

The criteria for evaluation proposals is project specific and not the usual criteria located online at our website. The criteria to be utilized can be found in the Request for Proposals package online at **www.txdot.gov/avn/avninfo/notice/consult/index.htm** and selecting "Center Municipal Airport ." All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Edie Stimach, Grant Manager at 1-800-68-PILOT at extension 4518. For technical questions, please contact John Wepryk, at 1-800-68-PILOT at extension 4533.

TRD-200802334
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: May 2, 2008

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The University of Texas System

Request for Information

In accordance with the provisions of *Texas Government Code*, Chapter 2254, The University of Texas System (U.T. System) requests information from law firms interested in representing U.T. System and U.T. institutions in the areas of law described below. U.T. System, located in Austin, governs six health institutions (located in Dallas, Galveston, Houston, San Antonio, and Tyler) and nine academic institutions (located in Arlington, Austin, Brownsville, Dallas, Edinburg, El Paso, Midland-Odessa, San Antonio, and Tyler). This RFI is issued to establish a referral list from which U.T. System, by and through its Office of General Counsel, will select appropriate counsel for representation of U.T. System and U.T. institutions on specific matters as the need arises during the timeframe beginning September 1, 2008 to August 31, 2010. U.T. System invites responses to this RFI from qualified firms for the provision of legal services under the direction and supervision of the U.T. System's Office of General Counsel. Subject to approval by the Texas Attorney General, U.T. System will engage outside counsel with experience in the following areas of law:

Communications (FCC): Representation and advice regarding communications law, noncommercial broadcast issues, First Amendment and broadcast journalism legal issues, including but not limited to preparing, filing, prosecuting, maintaining, and renewing various permits, licenses, and license applications with the Federal Communications Commission.

Corporate Law: Representation and advice regarding corporate and securities transactions and regulations, including but not limited to entity formation, such as corporations, joint ventures, limited partnerships, limited liability companies, 501(c)(3) corporations, and public-private partnerships; drafting and filing entity documents; filing for certificates of authority to transact business in other states; and private equity investing.

Employment Law: Representation and advice regarding complex employment law issues.

Export Controls: Representation and advice regarding U.S. export controls and related technology transfer controls, including but not limited to review, revision, implementation or updating of compliance policies and procedures; compliance training; review of deemed export or technical data export aspects of educational activities, laboratory research, sponsored research contracts, and other activities; export control classification, jurisdiction, and licensing advice; U.S. economic sanctions, embargoes, denied parties, and related matters; import/export counseling; compliance reviews. In addition, legal services may be provided concerning government contracting issues and application of relevant U.S. laws and regulations relating to same.

Federal ESEA: Representation and advice regarding implementation of the Elementary and Secondary Education Act (ESEA), including but not limited to assistance on U.T. System K-16 initiative; funding flows from ESEA; making appropriate contact with federal and state officials; presentations to U.T. System and institution personnel regarding the U.T. System initiative; presentations to the Texas Legislature, foundations, Regents, and others concerning the legal and practical aspects of the K-16 initiative.

Health Law: Representation and advice regarding billing, reimbursement, and health insurance provider issues; research contracting; Health Insurance Portability and Accountability Act (HIPAA); regulatory compliance; managed care contracting; healthcare operations; and other general health law matters.

Immigration Law: Representation and advice regarding immigration law matters, including but not limited to petitioning for nonimmigrant visas (including H-1Bs); petitioning for employer sponsored permanent residence; representation before the Department of Labor, including labor condition applications, labor certifications, Program Electronic Review Management (PERM) complying with the Student and Exchange Visitor Information System (SEVIS) requirements; impact of homeland security issues on immigration law; and interaction with and representation before applicable U.S. governmental agencies, including the Department of Homeland Security and the Department of Labor, as well as the U.T. System Office of General Counsel, U.T. System institutions' international offices, and human resources offices. Outside counsel should be admitted to practice before all United States District Courts in Texas.

Intellectual Property Matters: Representation and advice regarding intellectual property matters, including but not limited to preparing, filing, prosecuting, and maintaining patent applications in the United States and other countries; securing copyright protection for computer software; preparing, filing, and prosecuting applications to register trademarks and service marks in the United States and other countries; complex licensing transactions; and all other related matters.

Litigation - General: Representation and advice regarding complex litigation matters, including but not limited to employment litigation, real estate litigation, wills and estate litigation, Texas Public Information Act litigation, and commercial and creditors' rights litigation.

Litigation - IP: Representation and advice regarding all intellectual property matters, including but not limited to pursuit of litigation against infringers of U.T. System intellectual property rights and defense of any intellectual property related claims.

Ombuds Services: Representation and advice on a wide variety of ombuds matters, including guidance regarding International Ombuds Association standards and laws regarding ombuds practices.

Public School Law: Representation and advice to U.T. Austin regarding public school law issues regarding the University Charter School and the University of Texas Elementary School.

Radio, Television, and Film Matters: Represent and advise the College of Communication at U.T. Austin regarding the creation and operation of legal entities designed to support, enhance, finance, and otherwise contribute to the film program and to prepare and file appropriate documentation to evidence the legal affairs of such entities as well as other related matters.

Real Estate and Finance Transactions: Representation and advice regarding acquisitions, dispositions, eminent domain, financings, entity formation (joint ventures, limited partnerships, limited liability companies, real estate investment trusts, business trusts), securitization, leasing, construction contracting, and workouts and restructurings.

Real Estate and Oil & Gas Transactions Outside the State of Texas: Representation and advice regarding real estate and oil and gas transactions, including but not limited to litigation or hearings related to oil, gas, or other mineral interests that are located outside the State of Texas and that are either owned by or proposed to be given to U.T. System or one of its institutions; and litigation or hearings related to real estate interests and trust, estate, and probate matters that are located outside the State of Texas and that are either owned by or proposed to be given to U.T. System or one of its institutions.

Tax-Exempt Bond Matters: Public, tax-exempt bond issuance is conducted under two major programs and is rated by three major rating agencies. Under authority granted in Article VII, Section 18 of the Texas Constitution, Chapter 55, Texas Education Code and Chapters 1207 and 1371, Texas Government Code, and other applicable laws, the U.T. System issues revenue bonds for capital improvements in support of the U.T. System's $8.4 billion Capital Improvement Program. Commercial paper and flexible rate note programs are generally used for interim financing with long-term bonds sold to provide more permanent financing. These long-term bonds, which may be either fixed

rate or variable rate, may be combined with interest rate swap agreements pursuant to International Swaps and Derivatives Association, Inc. (ISDA) master swap agreements. Advance refunding of bonds, interest rate swaps, and escrow restructures of previously defeased bonds, are expected to be undertaken based on market conditions. Federal tax related matters regarding bonds issued by the U.T. System, including strategies and management practices in the conduct of an exempt debt program requires a close working relationship with bond counsel. In addition, the U.T. System works with counsel regarding the preparation of the annual Securities and Exchange Commission filings. Contact with debt management staff is frequent due to the volume of debt issuance.

Tax Matters: Representation and advice regarding state taxes, state pension issues and plans available only to universities, and regarding federal income, estate, gift, employment, and excise taxes, including but not limited to matters regarding: taxation of any kind, including tax liens, tax garnishments, tax levies, tax assessments, tax valuations, as well as summonses, subpoenas, and discovery relating to tax matters; tax audits; appeals of tax issues; tax hearings before administrative law judges and magistrates; appeals to Internal Revenue Service (IRS) appeals officers, district court, U.S. Tax Court, U.S. District Court, U.S. Court of Claims, and other venues on tax matters; employee benefits such as Internal Revenue Code (I.R.C.) Section 125 cafeteria plans, the Texas Optional Retirement Program, I.R.C. Section 403(b), Section 415(m), and Section 457(a), Section 457(b), and Section 457(f) plans; income tax matters, including unrelated business income tax as it relates to universities; federal tax matters regarding compensation issues related to university hospitals and physicians; interaction with and representation before the IRS and other taxing authorities in any tax controversy; and charitable fundraising activities. Although outside counsel will not be required to prepare the System tax return, it will be required to give legal advice on issues relating to the filing of tax returns and the appropriate treatment of tax matters on such returns. Outside counsel should be admitted to practice before the Texas district courts, the U.S. Tax Court, the U.S. District Court and the U.S. Court of Claims.

UTIMCO Oversight: Representation and advice to the U.T. System Board of Regents regarding the discharge of its fiduciary duties in managing the investment funds under its control by responding to the more complex legal questions that arise in investment management areas, including questions regarding compliance with the intent behind Sarbanes-Oxley duties and responsibilities; and to the Office of General Counsel and the Office of Finance in their provision of enhanced oversight over The University of Texas Investment Management Company.

Utility Matters: Representation and advice in utility matters, including but not limited to natural gas, electric, and telecommunications matters, including reviewing contracts, conducting research, rendering legal opinions, pursuing litigation, and handling other utility-related legal matters.

Responses: Responses to this RFI should include at least the following information: (1) a description of the firm's or attorney's qualifications for performing the legal services, including the firm's prior experience in the specific area of law for which the firm is responding; (2) the expertise, including scientific or technical, of the attorneys that would be assigned to work on such matters; (3) the submission of fee information in the form of a range of hourly rates (not to exceed $500 per hour) for each billing class of personnel who may be assigned to perform services in relation to U.T. System's matter and/or a proposed flat fee or other fee arrangement directly related to the achievement of specific goals and cost controls; (4) a description of the efforts made by the firm to encourage and develop the participation of minorities and women in the provision both of the firm's legal services generally and the specific areas of law in particular; (5) disclosures of conflicts of interest (identifying each and every matter in which the firm has, within the past calendar year, represented any entity or individual with an interest adverse to the U.T. System or to the State of Texas, or any of its boards, agencies, commissions, universities, or elected or appointed officials); (6) the firm's agreement with the billing guidelines, which among other things sets forth the allowable billable expenses; and (7) confirmation of willingness to comply with policies, directives, and guidelines of the U.T. System and the Attorney General of the State of Texas. Responses will be reviewed by U.T. System and the U.T. System institutions. You will be contacted via email if the U.T. System or a U.T. System institution chooses to contract with your firm for outside counsel services.

Format and Person to Contact: Responses are to be completed online at http://www.utsystem.edu/OGC/RFIResponse. Please do not forward any materials directly to U.T. System. Questions should be addressed to Barry D. Burgdorf, Vice Chancellor and General Counsel, Office of General Counsel, The University of Texas System and sent to bhurst@utsystem.edu.

Deadline for Submission of Response: All responses must be completed and submitted to the Office of General Counsel of U.T. System through the website noted above no later than 11:59 p.m., Monday, June 16, 2008.

TRD-200802405
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: May 7, 2008

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).